

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/1. Libel and slander actions.

## **LIBEL AND SLANDER (**

### **1. THE CAUSES OF ACTION**

#### **(1) INTRODUCTION**

##### **(i) General Provisions**

##### **1. Libel and slander actions.**

In English law, speaking generally, every person is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.

If a defamatory statement is made in writing or printing or some other permanent form<sup>1</sup>, the tort of libel is committed and the law presumes damage<sup>2</sup>. If the defamation is oral, or in some other transient form, it constitutes the tort of slander which is not actionable at common law<sup>3</sup> without proof of actual damage<sup>4</sup>, except where the statement is one of a particular character<sup>5</sup>.

The actions of libel and slander are thus private legal remedies, the object of which is to vindicate the plaintiff's reputation<sup>6</sup> and to make reparation for the private injury done by the wrongful publication to a third person or persons of defamatory statements concerning the plaintiff. The defendant in these actions may prove the truth of the defamatory matter and thus show that the plaintiff has received no injury; for although there may be damage accruing from the publication, yet, if the facts published are true, the law gives no remedy by action<sup>7</sup>.

1 As to publication in a permanent form see PARA 11 post; as to publication by broadcasting see PARA 76 post.

2 *Ratcliffe v Evans* [1892] 2 QB 524 at 528, CA, per Bowen LJ; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 145, CA.

3 Many slander actions are now, by statute, actionable without proof of special damage: see PARA 57 post.

4 *Stanhope v Blith* (1585) 4 Co Rep 15a; *Hopwood v Thorn* (1849) 8 CB 293; *Savile v Jardine* (1795) 2 Hy Bl 531; *Davies v Solomon* (1871) LR 7 QB 112; see also PARAS 12, 19, 257-259 post.

5 I.e. words imputing a criminal offence, unchastity to a female or certain contagious diseases; or words calculated to disparage a person in any office, profession, calling, trade or business held or carried on by him at the time of the publication: see PARAS 20, 56-59 post.

6 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071, [1972] 1 All ER 801 at 824, HL, per Lord Hailsham of St Marylebone LC, citing *Uren v John Fairfax & Sons Pty Ltd* (1965-66) 117 CLR 118 at 150 per Windeyer J.

7 3 Bl Com (14th Edn) 125. The passage from which the text is taken speaks of actions of damages for libel and slander as actions on the case. This title deals primarily with defamation which reflects upon the plaintiff or prosecutor personally, but as to actions for slander of title or of goods and other malicious falsehood see PARA 274 et seq post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/2. Legal aid.

## **2. Legal aid.**

Legal aid is not available in actions wholly or partly in respect of defamation, except that a defendant to a counterclaim for defamation in proceedings for which legal aid may be given may be granted legal aid to enable him to defend the counterclaim<sup>1</sup>.

<sup>1</sup> See the Legal Aid Act 1988 s 14(1), Sch 2 Pt II para 1. The *Report of the Faulks Committee on Defamation* (Cmd 5909) (1975) PARA 581 recommended that legal aid be made available in actions for defamation and injurious falsehood. As to actions for malicious or injurious falsehood see PARA 274 post.

### **UPDATE**

## **2 Legal aid**

NOTE 1--As to the replacement of the legal aid system under the Legal Aid Act 1988 by the Access to Justice Act 1999 Pt I (ss 1-26) see LEGAL AID vol 65 (2008) PARA 2.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/3. Privileged statements.

## **3. Privileged statements.**

On the ground of public policy, no action lies in respect of statements, however defamatory and damaging, made in certain particular circumstances.

Statements so made are said to be privileged, and fall into two classes according to whether the privilege is 'absolute' or 'qualified'<sup>1</sup>. Absolute privilege is a complete defence to proceedings for defamation, whether for libel or slander. It confers protection even when the words complained of are published maliciously. Examples are words spoken by a judge in his judicial capacity or by a member of Parliament in the course of proceedings in Parliament. Qualified privilege confers only a limited protection, since it is open to the plaintiff to remove the privilege by proving that the words complained of were published with actual malice. Examples are words published in the discharge of a public or private duty, or where there is a legitimate common interest in their subject matter shared between the defendant and the person or persons to whom the words were published.

<sup>1</sup> As to the law relating to absolute and qualified privilege see PARA 94 et seq post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/4. Slander of title or goods and malicious falsehood.

## **4. Slander of title or goods and malicious falsehood.**

At common law, apart from actions for libel and slander properly so called, an action on the case lies for statements, oral or written, which, although not defamatory, are false, made and published with actual malice towards the plaintiff and causing actual damage.

Such actions on the case include actions for slander of title, that is to say false oral or written statements made and published with actual malice in disparagement of the plaintiff's legal or equitable title to land or goods and causing damage<sup>1</sup>, and actions for slander of goods, that is to say false oral or written statements made and published with actual malice in disparagement of the plaintiff's goods, not merely of his title to the goods, and causing damage<sup>2</sup>. The principle extends at common law to all cases in which damage is wilfully and intentionally done by the publication, without lawful occasion or excuse, of oral or written falsehood<sup>3</sup>.

At common law it is necessary to prove actual damage in all such actions, although there are important statutory modifications to this requirement<sup>4</sup>.

1 See PARA 276 post.

2 See PARA 277 post.

3 See PARA 274 et seq post.

4 See the Defamation Act 1952 s 3; and PARA 285 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/5. Criminal libel.

## 5. Criminal libel.

Libel may be a criminal offence as well as a civil wrong because of its tendency to provoke a breach of the peace. An indictment will lie (1) where the libel tends to provoke the person defamed to commit a breach of the peace<sup>1</sup>; or (2) where it is in the public interest in all the circumstances that criminal proceedings should be brought<sup>2</sup>. Hence, publication to the person defamed may support a criminal prosecution but not a civil action<sup>3</sup>. The prosecution is not bound to prove that the libel is unusually likely to provoke a breach of the peace<sup>4</sup>.

At common law the truth of defamatory matter was not a defence to a prosecution for criminal libel<sup>5</sup>, but this is no longer so if, in addition to the truth of the defamatory matter, the defendant can also establish that its publication was for the public benefit<sup>6</sup>.

1 *Hicks' Case* (1618) Hob 215; *R v Summers* (1665) 1 Lev 139; *R v Saunders* (1670) T Raym 201; *R v Holbrook* (1878) 4 QBD 42 at 46 per Lush J.

2 Ie taking into account eg the importance of the person defamed and the gravity of the libel (*Goldsmith v Pressdram Ltd* [1977] QB 83, [1977] 2 All ER 557) or defence pleas such as justification (*Desmond v Thorne* [1982] 3 All ER 268, [1983] 1 WLR 163). As to blasphemous libel see *R v Lemon* [1979] QB 10, [1978] 3 All ER 175, CA; affd sub nom *Whitehouse v Gay News Ltd*, *Whitehouse v Lemon* [1979] AC 617, [1979] 1 All ER 898, HL; *Desmond v Thorne* supra; and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 826.

3 As to the distinction between civil actions and criminal prosecutions for libel see PARAS 14, 288 et seq post.

4 *R v Wicks* [1936] 1 All ER 384, CCA.

5 3 Bl Com (14th Edn) 125.

6 See the Libel Act 1843 s 6; and PARA 296 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/6. Defamation of the dead.

## 6. Defamation of the dead.

Damage to the plaintiff's reputation being the essence of civil proceedings for defamation<sup>1</sup>, an action for libel or slander does not lie in respect of defamation of a dead person<sup>2</sup>. However, criminal proceedings may be instituted in respect of a libel on a dead person published with the intention, or, possibly, with a tendency, to injure the reputation of his surviving relatives so that they may be excited to revenge and to a breach of the peace<sup>3</sup>.

1 See the *Report of the Committee on the Law of Defamation* (Cmd 7536) (1948) PARA 27. The committee recommended that there should be no alteration of the law. The *Report of the Faulks Committee on Defamation* (Cmnd 5909) (1975) recommended that, for a period of five years after death, specified survivors should be entitled to bring an action limited to a declaration that the matter complained of was untrue and to an injunction, but not for damages: see PARA 423(b).

2 See *Hatchard v Mège* (1887) 18 QBD 771, DC; *Broom v Ritchie & Co* (1904) 6 F 942, Ct of Sess. The Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended) did not change the existing law in this respect: see s 1(1) proviso (amended by the Administration of Justice Act 1982 s 75(1), Sch 9 Pt I); and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 814.

3 5 Co Rep 125a; *R v Topham* (1791) 4 Term Rep 126; *R v Critchley* (1791) 4 Term Rep 130n; *R v Hunt* (1824) 2 State Tr NS 69 at 98; *R v Ensor* (1887) 3 TLR 366; *R v Labouchere* (1884) 12 QBD 320. See also PARA 14 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/7. Group defamation.

## 7. Group defamation.

A class of persons cannot be defamed as a class, nor can an individual be defamed by a mere general reference to the class to which he belongs; but a person or persons may bring an action if he is or they are pointed to by the words complained of<sup>1</sup>.

1 *Knupffer v London Express Newspaper Ltd* [1944] AC 116 at 124, [1944] 1 All ER 495 at 499, HL, per Lord Porter; *Shloimovitz v Clarendon Press (a firm)* (1973) Times, 6 July. As to identification generally see PARA 39 post. It seems that to allege that an unidentified member or members of a limited class is or are guilty of misconduct may be actionable by each member of the class in imputing that each was to be suspected of the misconduct: *Farrington v Leigh* (1987) Times, 10 December, CA. Group defamation is commonly understood as signifying false statements vilifying groups or classes of persons distinguishable by race, colour, creed or vocation. As to the prohibition of racial discrimination see DISCRIMINATION vol 13 (2007 Reissue) PARA 436 et seq. The Committee on the Law of Defamation in 1948 recommended that the existing law should not be changed so as to bring group defamation within the scope of a civil action: *Report of the Committee on the Law of Defamation* (Cmd 7536) (1948) PARAS 30-32.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/8. Disclosure of libel.

## 8. Disclosure of libel.

The publisher of a libel has no right of action against a person who merely brings the libel to the notice of the person libelled, unless the person was under a contractual or other duty<sup>1</sup> to keep it secret or confidential<sup>2</sup>. Where there has been a breach of such duty, there may be a claim for damages<sup>3</sup> or, where appropriate, for an account of profits<sup>4</sup>. An injunction may be granted to restrain the repetition of, or a threatened, publication in breach of confidence<sup>5</sup>.

A party to a civil action to whom a defamatory document is disclosed in the course of discovery of documents in that action may not use the document disclosed as a basis for an action for libel against the party who disclosed the document<sup>6</sup> without the leave of the court<sup>7</sup>. The position in respect of documents disclosed in criminal proceedings is different; no such implied undertaking attaches to the document but statutory restrictions apply<sup>8</sup>.

1 The equitable obligation of confidence is not confined to a contractual relationship: *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 per Megarry J; and see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 401 et seq; COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 13.

2 *Saunders v Seyd and Kelly's Credit Index Co Ltd* (1896) 75 LT 193, CA; *Weld-Blundell v Stephens* [1920] AC 956, HL; *Bradstreets British Ltd v Mitchell and Carapanayoti & Co Ltd* [1933] Ch 190.

3 However, the damages may be nominal: *Weld-Blundell v Stephens* [1920] AC 956, HL; *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA.

4 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

5 *Fraser v Evans* [1969] 1 QB 349 at 361, [1969] 1 All ER 8 at 11, CA, per Lord Denning MR; *Hubbard v Vosper* [1972] 2 QB 84, [1972] 1 All ER 1023, CA. As regards republication or repetition see PARAS 72, 80 post.

6 *Riddick v Thames Board Mills Ltd* [1977] QB 881, [1977] 3 All ER 677, CA.

7 The person to whom the document is disclosed is subject to an implied undertaking not to use the document for any collateral purpose until it has been read to or by the court or referred to in open court: see RSC Ord 24 r 14A. Such a person may apply to the court to be released from the undertaking in order to bring an action, but leave will only be given in special circumstances: *Crest Homes plc v Marks* [1987] AC 829, [1987] 2 All ER 1074, HL. See further CIVIL PROCEDURE.

8 See *Mahon v Rahn* (1997) Times, 12 June, CA; the Criminal Procedure and Investigations Act 1996 s 17; and CRIMINAL LAW, EVIDENCE AND PROCEDURE.

## UPDATE

### 8 Disclosure of libel

TEXT AND NOTE 7--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 8--*Mahon v Rahn*, cited, reported at [1997] 3 All ER 687.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(i) General Provisions/9. Indemnity.

### 9. Indemnity.

An agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter is not unlawful unless at the time of the publication that person knows that the matter is defamatory and does not reasonably believe that there is a good defence to any action brought in respect of it<sup>1</sup>.

1 Defamation Act 1952 s 11. This provision is declaratory: *Report of the Committee on the Law of Defamation* (Cmd 7536) (1948) PARA 33. See also PARA 38 post; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1270.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(ii) Definitions and Distinctions/10. Defamatory statement.

## (ii) Definitions and Distinctions

### 10. Defamatory statement.

A defamatory statement<sup>1</sup> is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business<sup>2</sup>.

1 As to defamatory statements see further PARAS 11-12, 39 et seq post. A statement may be in the form of words or pictures or visual images or gestures or other methods of signifying meaning: see the Defamation Act 1952 s 16(1); the Defamation Act 1996 s 17(1); and PARA 11 note 1 post.

2 See further PARA 57 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(ii) Definitions and Distinctions/11. Actionable libel.

### 11. Actionable libel.

A libel for which an action will lie is a defamatory statement made or conveyed by written or printed words or in some other permanent form<sup>1</sup>, published of and concerning the plaintiff<sup>2</sup>, to a person other than the plaintiff<sup>3</sup>.

1 Libels are generally in writing or in print, but may be eg a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures: *Monson v Tussauds Ltd*, *Monson v Louis Tussaud* [1894] 1 QB 671 at 692, CA. See also Com Dig, Libel (A), and Bac Abr, Libel (A), instancing (on the authority of *Case de Libellis Famosis* (1605) 5 Co Rep 125a at 125b) the fixing up of a gallows at a man's door as a libel, and citing *Jefferies v Duncombe* (1809) 11 East 226 (placing a lighted lamp before a man's door to indicate that his house is a house of ill-fame); *Du Bost v Beresford* (1810) 2 Camp 511 (libel by picture); and *Levi v Milne* (1827) 4 Bing 195 (ignominious wood-cut heading and ridiculous doggerel). See also *Austin v Culpeper* (1683) Skin 123 (pillory drawn); *Spall v Massey* (1819) 2 Stark 559 (printed inscription opposite a man's house insinuating that it was a house of ill-fame); *Smith v Wood* (1812) 3 Camp 323 (caricature print); *Monson v Tussauds Ltd*, *Monson v Louis Tussaud* supra (waxwork exhibits); *Ralston v Ralston* [1930] 2 KB 238 (inscription on tombstone relating to a living person); *Tolley v JS Fry & Sons Ltd* [1931] AC 333, HL (caricature in newspaper advertisement); *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, CA (film sound-track). The publication of words in the course of a performance of a play must be treated as publication in permanent form: see the Theatres Act 1968 s 4(1); and PARAS 76-77 post. This does not apply in relation to a performance of a play given on a domestic occasion in a private dwelling, rehearsals and certain other performances: see ss 4(1), 7 (as amended); and PARA 77 post. 'Words' includes pictures, visual images, gestures and other methods of signifying meaning: s 4(3). The same meaning applies in the Defamation Act 1952 (see s 16(1)); and in the Defamation Act 1996 (see s 17(1)). As to publication by broadcasting see PARA 76 post. As to libellous statements in a will and the court's power to order such statements to be expunged see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 139. As to the innuendo see PARA 47 post.

As to the statutory right to compensation for (1) damage and distress caused by inaccuracy in personal data held by a data user under the Data Protection Act 1984; and (2) unauthorised disclosure of such data see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 530.

2 As to the meaning of 'published of and concerning the plaintiff' see PARAS 39, 60 note 5 post.

3 Publication to the prosecutor alone may support a criminal libel: see PARAS 5 ante, 288 post. As to publication by the defendant's wife or husband see PARA 75 post.

## UPDATE

### 11 Actionable libel

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--1984 Act repealed: Data Protection Act 1998 Sch 16 Pt I. See further CONFIDENCE AND DATA PROTECTION.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(ii) Definitions and Distinctions/12. Actionable slander.

### 12. Actionable slander.

A slander for which an action will lie is a defamatory statement, made or conveyed by spoken words, sounds, looks, signs, gestures or in some other non-permanent form<sup>1</sup>, published<sup>2</sup> of and concerning the plaintiff<sup>3</sup>, to a person other than the plaintiff<sup>4</sup>, by which the plaintiff has suffered actual damage, often referred to as special damage<sup>5</sup>, which he must allege and prove, or which is actionable per se at common law<sup>6</sup>, or where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business carried on by him at the time of publication<sup>7</sup>.

1 *Gregory v Duke of Brunswick* (1844) 6 Man & G 953 at 959 per Coltman J; *Gutsole v Mathers* (1836) 1 M & W 495 at 501 per Lord Abinger CB; *Cook v Cox* (1814) 3 M & S 110 at 114 per Lord Ellenborough CJ; *Drysdale v Earl of Rosebery* 1909 SC 1121. As to publication by broadcasting see PARA 76 post. The publication of words in the course of a performance of a play must be treated as publication in a permanent form: see PARA 11 note 1 ante.

2 See PARA 11 note 3 ante.

3 See PARA 11 note 2 ante.

4 See PARA 11 note 3 ante. As to publication by the defendant's wife or husband see PARA 75 post.

5 See PARAS 257-259 post. As to damages generally see PARA 18 et seq post.

6 See PARA 50 et seq post.

7 See PARAS 20, 57 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(ii) Definitions and Distinctions/13. Distinctions between libel and slander.

### 13. Distinctions between libel and slander.

There are two chief distinctions in practice between libel and slander<sup>1</sup>, or, broadly speaking, between written and spoken defamation:

- 1 (1) an actionable libel can in certain circumstances be dealt with by criminal proceedings, whereas no slander, even though civilly actionable, is as such a criminal offence<sup>2</sup> unless it contravenes the law as being, for example, obscene, blasphemous or seditious<sup>3</sup> or a contempt of court<sup>4</sup>;
- 2 (2) no special damage need be alleged or proved in an action for libel, whereas, unless the defamatory words complained of are actionable per se at common law or by statute, no action of slander will lie if the plaintiff does not both allege and prove that he has suffered actual damage<sup>5</sup>.

1 The *Report of the Faulks Committee on Defamation* (Cmnd 5909) (1975) PARA 91 recommended that the distinction be abolished and slander be assimilated to libel.

2 *R v Penny* (1697) 1 Ld Raym 153.

3 As to sedition, blasphemy and obscenity see CRIMINAL LAW, EVIDENCE AND PROCEDURE. A slander may also be criminal as being an incitement to commit a crime or a challenge to fight (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (Reissue) PARAS 65, 555 et seq) or as being a false statement as to a candidate at an election (see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARAS 683, 886). It seems that a combination to insult and annoy a person is an indictable conspiracy: *Mogul SS Co Ltd v McGregor, Gow & Co* [1892] AC 25 at 38, HL.

4 As to the jurisdiction to punish criminal contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 404 et seq.

5 See PARA 18 et seq, 257-259 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(ii) Definitions and Distinctions/14. Distinctions between civil and criminal law.

### 14. Distinctions between civil and criminal law.

Although the main principles of the law of libel are equally applicable to civil actions and to criminal prosecutions<sup>1</sup>, there are some distinctions.

To maintain a civil action there must have been publication to a third person, but to support a criminal prosecution, publication to the defamed person alone will suffice<sup>2</sup>. No civil action can be brought for a libel on a dead person<sup>3</sup>. However, a criminal prosecution may be brought for a libel on a dead person if the libel was intended or, possibly, tended to injure the living and to incite a breach of the peace<sup>4</sup>. No civil action can be brought for defamation of a group, class or race, but it has been said that a criminal prosecution may be brought if the libel was likely to cause a breach of the peace<sup>5</sup>.

Truth is a complete defence to a civil action for libel, but was not a defence at common law to a criminal prosecution. However, by statute truth is a defence to a criminal prosecution if publication was for the public benefit<sup>6</sup>.

The doctrine of vicarious liability applies equally at common law to the publication of libels, whether they are the subject of civil actions or criminal proceedings, but the common law rule has been relaxed by statute in relation to prosecutions for libel<sup>7</sup>.



1 See PARA 288 et seq post. In criminal law libel is referred to as defamatory libel, to distinguish it from obscene, seditious and blasphemous libel.

2 See PARA 5 ante.

3 Ie unless the words were understood to be defamatory of eg a surviving relative. Thus, an allegation that the deceased led a life of immorality and fathered a bastard son might be defamatory of the surviving son.

4 *R v Topham* (1791) 4 Term Rep 126; *R v Ensor* (1887) 3 TLR 366. Cf *R v Labouchere* (1884) 12 QBD 320. See PARA 6 ante, and the cases there cited.

5 *R v Osborn* (1732) 2 Barn KB 138 at 166 (libel on Jews). The view that the publication must tend to lead to a breach of the peace was, however, rejected in *R v Lemon* [1979] QB 10, [1978] 3 All ER 175, CA; affd sub nom *Whitehouse v Gay News Ltd, Whitehouse v Lemon* [1979] AC 617, [1979] 1 All ER 898, [1979] 2 WLR 281, HL (blasphemous libel). As to group defamation see PARA 7 ante; and as to stirring up racial hatred see DISCRIMINATION vol 13 (2007 Reissue) PARA 505; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 555 et seq.

6 See PARA 5 text and notes 5-6 ante.

7 See *R v Holbrook* (1878) 4 QBD 42 at 46-47, DC, per Lush J; and PARAS 69 note 2, 288 et seq post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(ii) Definitions and Distinctions/15. Concurrent remedies.

## 15. Concurrent remedies.

A person may sue for his civil remedies and prosecute for the criminal offence concurrently<sup>1</sup>. A magistrate may not adjourn a summons for libel on the ground that civil proceedings are pending in regard to the same subject matter<sup>2</sup>.

1 *Ex p Edgar* (1913) 77 JP 283. In considering whether a libel is a criminal libel, it is irrelevant that damages might afford an adequate remedy to the complainant: *Goldsmith v Pressdram Ltd* [1977] QB 83 at 88, [1977] 2 All ER 557 at 562 per Wien J; *Desmond v Thorne* [1982] 3 All ER 268, [1983] 1 WLR 163.

2 *R v Evans* (1890) 62 LT 570, DC; *R v Bennett and Bond, ex p Bennet* (1908) 72 JP 362, DC; and see MAGISTRATES vol 29(2) (Reissue) PARA 707.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(iii) Falsity and Malice/16. Falsity and malice.

## (iii) Falsity and Malice

### 16. Falsity and malice.

In an action for libel or slander it was formerly the practice to allege in the statement of claim that the words were published falsely and maliciously<sup>1</sup>. However, the plaintiff does not have to prove falsity or malice to establish his cause of action. If the words are defamatory, the law presumes that they are false<sup>2</sup>, and it is for the defendant to plead and prove that the words are true<sup>3</sup>. In other words, the onus of proving justification is on the defendant.

The malice signified by the phrase 'falsely and maliciously' is malice in law, that is to say a wrongful act done intentionally, without just cause or excuse. Malice in that sense is presumed from the fact of publication of defamatory words, so that the plaintiff need not plead or prove

it<sup>4</sup>. This is to be distinguished from express malice<sup>5</sup>, which is actual malice or malice in fact. Express malice will rebut a defence of qualified privilege<sup>6</sup> or of fair comment<sup>7</sup>, and may be relevant on the issue of damages<sup>8</sup>. It is for the plaintiff to plead and prove the existence of express malice<sup>9</sup>.

1 *Bromage v Prosser* (1825) 4 B & C 247 at 255 per Bayley J. These words are now commonly omitted as being otiose.

2 See eg *Belt v Lawes* (1882) 51 LJQB 359 at 361.

3 As to justification see PARA 82 et seq post.

4 See *Anon* (1652) Sty 392; *Belt v Lawes* (1882) 51 LJQB 359, DC.

5 See PARA 149 et seq post.

6 As to qualified privilege see PARA 109 et seq post.

7 As to fair comment see PARA 135 et seq post.

8 As to damages see PARA 248 et seq post.

9 *Wright v Woodgate* (1835) 2 Cr M & R 573 at 577; *Clark v Molyneux* (1877) 3 QBD 237 at 247, CA, per Brett LJ; *Jenoure v Delmege* [1891] AC 73, PC; *Adam v Ward* [1917] AC 309, HL; *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL. To rebut a defence of qualified privilege or of fair comment, malice is pleaded in the reply: see PARA 195 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(iii) Falsity and Malice/17. Intention.

## 17. Intention.

The intention with which the words were written or spoken and published is irrelevant to the determination of the questions whether or not the words were understood to refer to the plaintiff, and whether they were understood to bear a meaning defamatory of him<sup>1</sup>. The defendant's intention will become relevant if the defendant relies on the defence of a statutory offer of amends<sup>2</sup>, or qualified privilege<sup>3</sup> or fair comment where malice is alleged against the defendant, and may be relevant on the issue of damages<sup>4</sup>. It may also be relevant in particular circumstances to whether a person is responsible for a publication so as to be liable<sup>5</sup>.

1 *E Hulton & Co v Jones* [1910] AC 20, HL. See also PARA 56 note 8 post.

2 For the effect of an offer of amends in cases of unintentional defamation see the Defamation Act 1996 ss 2-4; and PARAS 160-163 post. At the date at which this volume states the law, ss 2-4 had not been brought into force.

3 As to qualified privilege see PARA 109 et seq post.

4 *Jones v E Hulton & Co* [1909] 2 KB 444 at 479, CA, per Farwell LJ; see also *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 772, HL, per Lord Blackburn; approved in *Jones v E Hulton & Co* supra at 456 per Lord Alverstone CJ; affd [1910] AC 20, HL.

5 See the Defamation Act 1996 s 1; and PARAS 157-158 post.

## UPDATE

### 17 Intention

NOTE 2--1996 Act ss 2, 3(1)-(8), (10), 4 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(iv) Whether Damage must be Shown/18. Damage in libel.

## **(iv) Whether Damage must be Shown**

### **18. Damage in libel.**

If a person has been libelled without any lawful justification or excuse, the law presumes that some damage will flow in the ordinary course of events from the mere invasion of his right to his reputation, and such damage is known as 'general damage'<sup>1</sup>. Thus, a plaintiff in a libel action is not required to prove his reputation, nor to prove that he has suffered any actual loss or damage<sup>2</sup>. The plaintiff is not obliged to testify<sup>3</sup>, although it is customary for him to do so<sup>4</sup>, but, having proved a statement defamatory of him and not excused by any available defence, he is always entitled at least to nominal damages<sup>5</sup>. However, it is open to a plaintiff in a libel action to plead and prove special damage which he is entitled to recover in addition to general damage. In appropriate circumstances he may also seek aggravated<sup>6</sup> or exemplary<sup>7</sup> damages.

1 *Ratcliffe v Evans* [1892] 2 QB 524 at 528-530, CA, per Bowen LJ.

2 *Hobbs v CT Tinling & Co Ltd, Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1 at 17, CA, per Scrutton LJ.

3 *Tripp v Thomas* (1824) 3 B & C 427, where an award of £40 was upheld in a slander action although the plaintiff did not testify and called no evidence; *Cook v Ebert* (25 May 1973, unreported), QB, where the jury awarded £1,000 to the plaintiff who did not testify.

4 *Goody v Odhams Press Ltd* [1967] 1 QB 333 at 337, [1966] 3 All ER 369 at 370, CA, per Salmon LJ; *Keeley v Wakley* (1893) 9 TLR 571, DC; *Vidal v Temperly* (1899) 20 NSWLR 223.

5 *Hobbs v CT Tinling & Co Ltd, Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1 at 17, CA, per Scrutton LJ; *Vidal v Temperly* (1899) 20 NSWLR 223.

6 See PARA 250 et seq post.

7 See PARA 256 post.

## **UPDATE**

### **18 Damage in libel**

NOTE 2--A company may sue for defamation which is damaging to its business: *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28. No breach of the European Convention on Human Rights art 10 is occasioned by the principle that a claimant does not have to allege or prove special damage in order to establish a cause of action: *Jameel v Wall Street Journal Europe SPRL* [2005] EWCA Civ 74, [2005] QB 904; and *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(iv) Whether Damage must be Shown/19. Damage in slander.

### **19. Damage in slander.**

If the words in an action for slander are not actionable per se<sup>1</sup> at common law or by statute, the plaintiff must allege and prove actual material loss<sup>2</sup>. If he fails to allege and prove that he has suffered such loss, there must be judgment for the defendant, since the existence of some such loss is essential to the cause of action<sup>3</sup>. A general loss of business will constitute actual material loss in this context<sup>4</sup>.

1 See PARA 20 post.

2 As to the undesirability of using the phrase 'special damage' in this context see *Ratcliffe v Evans* [1892] 2 QB 524 at 531, CA, per Bowen LJ; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1073, [1972] 1 All ER 801 at 825, HL, per Lord Hailsham of St Marylebone LC. As to damages see further PARA 248 et seq post.

3 *Ratcliffe v Evans* [1892] 2 QB 524, CA; *Alexander v Jenkins* [1892] 1 QB 797, CA. See also PARA 13 ante.

4 It is not essential to allege and prove special damage in the sense of particular customers or contracts lost: *Ratcliffe v Evans* [1892] 2 QB 524, CA; and see *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(iv) Whether Damage must be Shown/20. Oral defamatory statements actionable per se.

## **20. Oral defamatory statements actionable per se.**

An oral defamatory statement is actionable per se, that is without proof of special damage<sup>1</sup>, if (1) it is calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication<sup>2</sup>; (2) it is published of the plaintiff in the way of his office or calling and in relation to his conduct in it, and imputes unfitness for or misconduct in that office or calling<sup>3</sup>; (3) it imputes that the person of whom the words are published has committed a crime punishable by imprisonment<sup>4</sup>; (4) it imputes that the person of whom the words are published is at the time of the publication suffering from certain contagious diseases<sup>5</sup>; or (5) it imputes unchastity or adultery to a woman<sup>6</sup>.

1 As to special damage see PARAS 18 ante, 257 et seq post.

2 See the Defamation Act 1952 s 2; and PARA 57 post. As to where the office is one of honour and not one of profit see *Alexander v Jenkins* [1892] 1 QB 797, CA; *Robinson v Ward* (1958) 108 L Jo 491.

3 *Jones v Jones* [1916] 2 AC 481, HL; *Hopwood v Muirson* [1945] KB 313, [1945] 1 All ER 453, CA. Although largely superseded by the Defamation Act 1952 s 2, this head still exists.

4 See PARA 56 post.

5 See PARAS 53, 59 post.

6 See PARA 58 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(1) INTRODUCTION/(v) Defences in general/21. Defences available.

## **(v) Defences in general**

### **21. Defences available.**

The following are the defences that are possible in an action for defamation<sup>1</sup>:

- 3 (1) that the defendant did not publish the words complained of<sup>2</sup>;
- 4 (2) that the words complained of did not refer to the plaintiff<sup>3</sup>;
- 5 (3) that the words complained of did not bear any meaning defamatory of the plaintiff<sup>4</sup>;
- 6 (4) that the words complained of were true in substance and in fact<sup>5</sup>;
- 7 (5) that the words complained of were published on an occasion of absolute privilege<sup>6</sup>;
- 8 (6) that the words complained of were published on an occasion of qualified privilege<sup>7</sup>;
- 9 (7) that the words complained of were fair comment on a matter of public interest<sup>8</sup>;
- 10 (8) that the defendant has made an offer of amends and did not know or have reason to believe that the words complained of referred to the plaintiff and were false and defamatory of the plaintiff<sup>9</sup>;
- 11 (9) in the case of libel in a newspaper or other periodical publication, apology and payment into court<sup>10</sup>;
- 12 (10) that the words complained of were published with the consent of the plaintiff<sup>11</sup>;
- 13 (11) accord and satisfaction<sup>12</sup>;
- 14 (12) release<sup>13</sup>;
- 15 (13) limitation<sup>14</sup>;
- 16 (14) *res judicata*<sup>15</sup>;
- 17 (15) that the publication was made abroad and is justifiable, or not actionable, in the country of publication<sup>16</sup>;
- 18 (16) in actions of slander, (a) that the words complained of were not actionable without proof of actual material loss and that no such loss is alleged or that such loss as is alleged is too remote in law<sup>17</sup>; or (b) that the words complained of were not calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at any material time<sup>18</sup>.

1 As to the defences which are peculiar to the law of libel and slander (ie heads (1)-(10), (15)-(16) in the text) see PARA 82 et seq post.

2 As to the need for publication see PARA 60 et seq post; and as to responsibility for publication see the Defamation Act 1996 s 1; and PARAS 157-158 post.

3 As to the need for reference to the plaintiff see PARA 39 post.

4 As to what is defamatory see PARA 42 et seq post.

5 As to justification see PARAS 82-93 post.

6 As to absolute privilege see PARAS 94-108 post.

7 As to qualified privilege see PARAS 109-134 post.

8 As to fair comment see PARAS 135-148 post.

9 See the Defamation Act 1996 ss 2-4; and PARAS 160-163 post. At the date at which this volume states the law, ss 2-4 had not been brought into force.

10 See the Libel Act 1843 s 2; and PARA 164 post. This defence is rarely, if ever, used now. Its abolition was recommended by the *Report of the Faulks Committee on Defamation* (Cmnd 5909) (1975) PARA 373.

11 Ie the defence of *volenti non fit injuria*, or 'leave and licence': see PARAS 165-166 post.

12 As to this defence see CONTRACT vol 9(1) (Reissue) PARAS 1043-1051.

13 As to this defence see CONTRACT vol 9(1) (Reissue) PARAS 1052-1054; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 12; and EQUITY vol 16(2) (Reissue) PARA 906.

14 See the Limitation Act 1980 ss 4A, 28(4A), 32A, 36(1) (as added and amended); and PARA 167 post.

15 See *Macdougall v Knight* (1890) 25 QBD 1, CA; *Greenhalgh v Mallard* [1947] 2 All ER 255, CA. As to this defence generally see ESTOPPEL vol 16(2) (Reissue) PARA 977 et seq.

16 See *Phillips v Eyre* (1870) LR 6 QB 1, Ex Ch; *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL. See also PARA 66 post; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 375.

17 See PARA 258 et seq post.

18 See PARA 57 post.

## UPDATE

### 21 Defences available

NOTE 9--1996 Act ss 2, 3(1)-(8), (10), 4 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/22. Plaintiff must be personally defamed.

## (2) PARTIES

### (i) Who may Sue

#### 22. Plaintiff must be personally defamed.

The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly the proper and only party to bring the action is the person actually and personally defamed<sup>1</sup>. Thus, it is not enough that the words reflect on the plaintiff's property; there must also be an imputation against the plaintiff personally, for example, that he has knowingly or negligently sold defective goods<sup>2</sup>.

1 See eg *Knopffer v London Express Newspaper Ltd* [1944] AC 116, [1944] 1 All ER 495, HL. As to group defamation see PARA 7 ante.

2 See PARA 42 post.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/23. Aliens.

### 23. Aliens.

An alien friend<sup>1</sup> may maintain an action of libel<sup>2</sup> or slander<sup>3</sup>, or any personal action<sup>4</sup>, even if he is resident outside the jurisdiction<sup>5</sup>.

1 As to alien friends see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13.

2 *Pisani v Lawson* (1839) 6 Bing NC 90; see also *Thoene v Lockwood & Co Ltd* (1911) Times, 11 April.

3 *Tirlot v Morris* (1611) 1 Bulst 134.

4 *Tirlot v Morris* (1611) 1 Bulst 134; approved in *Pisani v Lawson* (1839) 6 Bing NC 90 at 95.

5 *Pisani v Lawson* (1839) 6 Bing NC 90; see also *Thoene v Lockwood & Co Ltd* (1911) Times, 11 April. As to security for costs see RSC Ord 23 r 1(1)(a); and CIVIL PROCEDURE.

#### UPDATE

#### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/24. Bankrupts.

### 24. Bankrupts.

Every action of libel or slander is founded on a reflection on the plaintiff personally. Such a right of action accruing before or after bankruptcy remains with the bankrupt and does not pass to his trustee in bankruptcy<sup>1</sup>. However, the right to bring an action for slander of title or goods or for any other malicious falsehood reflecting on his property rather than his character<sup>2</sup> passes to the trustee in bankruptcy<sup>3</sup>.

1 *Benson v Flower* (1629) W Jo 215 (slander); *Re Wilson, ex p Vine* (1878) 8 ChD 364, CA (slander). In a wrongful dismissal action, rights of action for injuries to the bankrupt's person or feelings do not pass to his trustee: *Beckham v Drake* (1849) 2 HL Cas 579 at 597, 604, 612-613. As to what rights of action do and do not vest in the trustee see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 434 et seq; and as to after-acquired property see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 445 et seq.

2 See PARA 274 et seq post; and see generally *Wilson v United Counties Bank Ltd* [1920] AC 102, HL.

3 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 434 et seq.

#### UPDATE

#### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/25. Companies and corporations.

## 25. Companies and corporations.

A corporate body may maintain an action for libel or slander in the same way as an individual<sup>1</sup>. However, the imputation must reflect upon the company or corporation itself and not upon its members or officials only<sup>2</sup>. Unlike an individual, a company or corporation has no feelings, so the only damage it can suffer is injury to its reputation<sup>3</sup>. A company or corporation cannot sue in respect of an imputation of murder, incest or adultery because it cannot commit those crimes<sup>4</sup> but it seems that it can sue in respect of an allegation of corruption or bribery<sup>5</sup>. It has been said that it cannot sue in respect of an imputation concerning manners, as a company cannot be said to have indecent or vulgar manners<sup>6</sup>.

A trading company or corporation has a trading reputation and can maintain an action for libel or slander in respect of a statement that injures its trade or business<sup>7</sup>. A trading company or corporation may sue for an imputation of insolvency, mismanagement and the improper and dishonest conduct of its affairs<sup>8</sup>. It may sue for an imputation that it conducts its business badly and inefficiently<sup>9</sup> or that it is run by people of questionable honesty and background<sup>10</sup>. Such an imputation may be implicit in words which allege that a trading company sells poor quality goods<sup>11</sup>. The company is not required to prove that it has suffered special damage, such as financial loss<sup>12</sup>; it may recover damages for the injury to its goodwill<sup>13</sup>.

Institutions of central or local government, such as local authorities, have no right at common law to maintain an action for defamation<sup>14</sup>.

1 *Metropolitan Saloon Omnibus Co Ltd v Hawkins* (1859) 4 H & N 87 at 90 per Pollock CB; approved in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 142, 147, CA. See also *Williams v Beaumont* (1833) 10 Bing 260. As to libels on corporations see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1279. As to libels by or against companies or their agents see COMPANIES vol 14 (2009) PARAS 298-300. As to slanders at companies' meetings see COMPANIES vol 14 (2009) PARA 298.

2 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 141, CA, per Lord Esher MR.

3 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 262, sub nom *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, HL, per Lord Reid. See also *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 143, CA, per Ropes CJ.

4 *Metropolitan Saloon Omnibus Co Ltd v Hawkins* (1859) 4 H & N 87 at 90 per Pollock CB.

5 In *Manchester Corpn v Williams* [1891] 1 QB 94, DC, the statement of claim was struck out on the ground that a corporation, as distinct from the individuals comprising it, could not be guilty of corrupt practices. This decision was, however, severely criticised by Oliver J in *Willis v Brooks* [1947] 1 All ER 191, where an allegation of ballot-rigging was held to be actionable at the suit of a trade union. In *National Union of General and Municipal Workers v Gillian* [1946] KB 81, [1945] 2 All ER 593, CA, the court declined to strike out an action founded on matter which included allegations of or close to corruption.

6 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 138, CA, per Lord Esher MR.

7 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, CA (libel); *D and L Caterers Ltd and Jackson v D'Ajou* [1945] KB 364, [1945] 1 All ER 563, CA (slander); *Linotype Co Ltd v British Empire Type-Setting Machine Co Ltd* (1899) 81 LT 331, HL; *Slazengers Ltd v C Gibbs & Co* (1916) 33 TLR 35; *Lyons v Lipton* (1914) 49 L Jo 542. As to actions for false and malicious statements attended by special damage see PARA 274 et seq post.



- 8 *Metropolitan Saloon Omnibus Co Ltd v Hawkins* (1859) 4 H & N 87.
- 9 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139, CA, per Lord Esher MR.
- 10 *London Computer Operators Training Ltd v British Broadcasting Corp* [1973] 2 All ER 170, [1973] 1 WLR 424, CA. See also *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* [1973] QB 21, [1972] 3 All ER 417, CA; *Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450, [1970] 2 All ER 754, CA.
- 11 *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL, per Lord Halsbury.
- 12 *Selby Bridge Ltd (Proprietors) v Sunday Telegraph Ltd* (1966) 197 Estates Gazette 1077.
- 13 As to the meaning of goodwill see the discussion obiter in *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA. See also the cases cited in note 3 supra.
- 14 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011, HL, overruling *Bognor Regis UDC v Campion* [1972] 2 QB 169, [1972] 2 All ER 61. Such an action would be contrary to the public interest as such bodies should be open to uninhibited public criticism: *Derbyshire County Council v Times Newspapers Ltd* supra. The same principle has been applied to British Coal: see *British Coal Corp v National Union of Mineworkers* (28 June 1996, unreported), QB, per French J. As to political parties see PARA 27 note 6 post.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/26. Unincorporated associations.

### 26. Unincorporated associations.

An unincorporated association<sup>1</sup> is not a legal entity and may not sue. A representative action<sup>2</sup> cannot be brought on its behalf<sup>3</sup>.

1 See also PARAS 27-28 post; and COMPANIES vol 14 (2009) PARA 2.

2 As to when anyone may sue as a representative see RSC Ord 15 r 12; *John v Rees* [1970] Ch 345, [1969] 2 All ER 274; and CIVIL PROCEDURE.

3 *Jenkins v John Bull* (1910) Times, 20 April; *London Motor Cab Proprietors Association and British Motor Cab Co Ltd v Twentieth Century Press (1912) Ltd* (1917) 34 TLR 68 at 69.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/27. Trade unions, friendly societies and other associations.

## **27. Trade unions, friendly societies and other associations.**

It is not certain whether a trade union can sue in its own name for libel or slander<sup>1</sup>.

A registered friendly society<sup>2</sup> may sue for libel and must do so in its registered name<sup>3</sup>.

A trustee savings bank could sue for libel and slander<sup>4</sup>. An employers' association which is a body corporate may sue for libel and slander, although the position of such an association which is unincorporated is more doubtful, being analogous to that of a trade union<sup>5</sup>.

It is contrary to the public interest for a political party, even when set up as a corporation, to have any right at common law to maintain an action for defamation<sup>6</sup>.

1 A trade union is not a body corporate, but is nevertheless capable of suing and being sued in its own name: see the Trade Union and Labour Relations (Consolidation) Act 1992 s 10(1)(b), (2); and EMPLOYMENT vol 40 (2009) PARA 852. In *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* [1980] QB 585, [1980] 1 All ER 1097, it was held that a trade union may not sue in its own name for defamation as it does not possess the necessary personality which it could protect by an action in defamation; but cf *National Union of General and Municipal Workers v Gillian* [1946] KB 81, [1945] 2 All ER 593, CA; and see also *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011, HL, where it was assumed at 545 and 1015 that a trade union can sue for defamation.

2 For the meaning of 'friendly society' see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2082 et seq.

3 An action of libel or slander does not 'concern any property, right or claim' of the society within the Friendly Societies Act 1974 s 103(1): see *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662. As to proceedings by or against registered societies see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2290. See also *Irish People's Assurance Society v City of Dublin Assurance Co Ltd* [1929] IR 25.

4 *Knight and Searle v Dove* [1964] 2 QB 631, [1964] 2 All ER 307. See, however, the Trustee Savings Banks Act 1985 ss 1-4, which provided for the dissolution of the existing trustee savings banks and the formation of new companies to carry on their businesses; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 809.

5 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 127; and EMPLOYMENT vol 40 (2009) PARA 1029.

6 See *Goldsmith v Bhoyrul* (1997) Times, 20 June per Buckley J.

## **UPDATE**

### **22-38 Parties**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

## **27 Trade unions, friendly societies and other associations**

NOTE 6--*Goldsmith v Bhoyrul*, cited, reported at [1997] 4 All ER 268.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/28. Partners.

## **28. Partners.**

Partners may maintain a joint action for a libel or slander published of them in the way of their common trade or business<sup>1</sup>, without alleging or proving special damage<sup>2</sup>. The damages in such an action are not for injury to the reputation of the individual partners, but for the injury to them in their common trade or business<sup>3</sup>. An individual partner may join a separate claim for libel or slander upon him<sup>4</sup> with a joint claim of the firm, but he cannot as an individual recover for any damage resulting to the firm<sup>5</sup>; and, generally, claims by plaintiffs jointly may, subject to convenience, be joined with claims by them or any of them separately against the same defendant<sup>6</sup>.

1 See 2 Wms Saund (1871 Edn) 361, 382 (note (2)), 383 (note (t)), and *Cook v Batchellor* (1802) 3 Bos & P 150 (action for spoken words imputing fraud to the plaintiffs in weighing goods, where special damage was laid); *Forster v Lawson* (1826) 3 Bing 452 (libel imputing insolvency); *Le Fanu v Malcomson* (1848) 1 HL Cas 637 (libel on factory owners imputing cruelty to their employees). In a libel against a partnership the court may take into consideration, in estimating the damages, the prospective injury which may accrue by it to the partnership: *Gregory v Williams* (1844) 1 Car & Kir 568. As to defamatory statements reflecting on a class of persons see PARA 7 ante.

2 In his comment on *Cook v Batchellor* (1802) 3 Bos & P 150, notes to 2 Wms Saund (1871 Edn) at 382-383, Sergeant Williams expressed the opinion that although special damage was laid in *Cook v Batchellor* supra, if words are actionable only because they were spoken of persons in the way of their trade, two or more partners may join in an action for the words, even if they have sustained no special damage. This was assumed to be the law in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 146, CA. As to libel see *Le Fanu v Malcomson* (1848) 1 HL Cas 637; *Russell v Webster* (1874) 23 WR 59, cited in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* supra. In *Russell v Webster* supra it was held that a libel published of the plaintiffs in the way of their business as co-proprietors of a newspaper might be the subject of a joint action without proof of special damage, and that the court, in its discretion, might give general damages. Two joint tenants or co-partners could always join in an action of slander of their title to the estate.

3 See *Harrison v Bevington* (1838) 8 C & P 708 at 713 note (a).

4 *Haythorn v Lawson* (1827) 3 C & P 196 (action by partners for libel), on the principle of *Barratt v Collins* (1825) 10 Moore CP 446 (action by co-plaintiffs for malicious arrest).

5 See *Harrison v Bevington* (1838) 8 C & P 708. However, where words imputing insolvency in trade are spoken of one partner, he may maintain an action of slander and recover damages for the injury done to him. Such a wrong is not necessarily an injury to the partnership, which only a joint action can maintain: *Harrison v Bevington* supra. Cf *Robinson v Marchant* (1845) 7 QB 918.

6 As to the joinder of parties and causes of action see PARAS 31, 199 post; and CIVIL PROCEDURE.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/29. Executors and administrators.

### 29. Executors and administrators.

An action of libel or slander does not lie for the defamation of a dead person<sup>1</sup>, and the personal representatives of a deceased plaintiff in such an action cannot maintain or continue the

action<sup>2</sup>. However, in the case of actions for slander of title or goods or other malicious falsehood<sup>3</sup> the action survives for the benefit of the plaintiff's estate<sup>4</sup>.

1 See PARA 6 ante.

2 *Hatchard v Mège* (1887) 18 QBD 771, DC. As to abatement of actions on the death of either party see PARA 227 post.

3 See PARA 274 et seq post.

4 *Hatchard v Mège* (1887) 18 QBD 771, DC. As to property in trade marks see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 126 et seq. As to slander of title or goods or malicious falsehood see PARAS 274, 276-277 post.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/30. Husband and wife.

### 30. Husband and wife.

A married person may bring an action of libel or slander against his or her spouse<sup>1</sup>, although if such an action is brought during the subsistence of the marriage it may be stayed by the court if no substantial benefit would accrue to either party from the continuation of the proceedings<sup>2</sup>. A married person may also institute proceedings against his or her spouse for criminal libel<sup>3</sup>.

1 See the Law Reform (Husband and Wife) Act 1962 s 1(1).

2 See *ibid* s 1(2)(a).

3 As to criminal libel see PARA 5 ante. At common law a wife could not prosecute her husband for criminal libel: *R v Lord Mayor of London* (1886) 16 QBD 772. As to where a husband and wife are competent or compellable to give evidence against each other in criminal proceedings see CRIMINAL LAW, EVIDENCE AND PROCEDURE; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 212.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(i) Who may Sue/31. Persons claiming jointly, severally or in the alternative.

### 31. Persons claiming jointly, severally or in the alternative.

Two or more persons may be joined together in one action as plaintiffs with the leave of the court or where (1) if separate actions were brought by each of them some common question of law or fact would arise<sup>1</sup>; and (2) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions<sup>2</sup>. If it appears to the court that the joinder may embarrass or delay the trial, or is otherwise inconvenient, the court may order separate trials or make such other order as may be expedient<sup>3</sup>. Where in any cause or matter any thing is done or omission is made improperly or unreasonably by or on behalf of a party the court may direct that costs to that party in respect of it are not to be allowed to him and costs occasioned by it to the other parties are to be paid by him to them<sup>4</sup>.

1 RSC Ord 15 r 4(1)(a).

2 RSC Ord 15 r 4(1)(b).

3 RSC Ord 15 r 5(1). See also *Duke of Bedford v Ellis* [1901] AC 1 at 23, HL. One action can be brought for a libel or slander by the persons defamed by it, although there is no joint damage, but the plaintiffs are entitled to have the damages separately assessed: *Booth v Briscoe* (1877) 2 QBD 496, CA. See also, as to RSC Ord 15, the notes to those orders in the Supreme Court Practice 1997; and see CIVIL PROCEDURE.

4 RSC Ord 62 rr 10(1), 28(1).

#### UPDATE

#### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/32. The publisher.

### (ii) Who may be Sued

#### 32. The publisher.

As a general rule the person to be sued as the defendant in an action of libel or slander, or to be prosecuted on an indictment for a libel, is he who published the defamatory statement or caused it to be published<sup>1</sup>. Every person who participates in the publication may be liable as a publisher<sup>2</sup>.

1 As to what amounts to publication in libel actions see PARA 60 et seq post; and in slander actions see PARAS 79-81 post. As to publication for the purpose of criminal proceedings see PARAS 14 ante, 39 post. As to joint and several liability see PARA 38 post.

2 See PARA 38 post.

#### UPDATE

#### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/33. Bankrupts.

### **33. Bankrupts.**

A bankrupt may be sued but a successful plaintiff cannot prove in the bankruptcy for any damages or costs awarded unless he has signed judgment since only then is there a debt or liability. In determining whether the liability is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued<sup>1</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 382(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 491.

#### **UPDATE**

#### **22-38 Parties**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/34. Companies and corporations.

### **34. Companies and corporations.**

The position of companies and corporations in relation to their liability for the acts of their employees and agents is discussed elsewhere in this work<sup>1</sup>. A company or corporation may be indicted for a libel<sup>2</sup>.

<sup>1</sup> See PARA 71 note 3 post; COMPANIES vol 14 (2009) PARA 296, vol 15 (2009) PARA 1081; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1275 et seq.

<sup>2</sup> *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 at 408, [1939] 2 All ER 613 at 621, CA. See further PARA 289 note 1 post; COMPANIES vol 14 (2009) PARA 311; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1280; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 38.

#### **UPDATE**

#### **22-38 Parties**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/35. Unincorporated associations.

### **35. Unincorporated associations.**

Subject to certain exceptions<sup>1</sup>, an unincorporated association cannot be sued<sup>2</sup>. No officer or member of the association can be appointed to represent<sup>3</sup> the association<sup>4</sup>. The action must be brought against the officers or members who were responsible for the publication complained of<sup>5</sup>.

1 See PARA 36 post.

2 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 20, HL, per Lord Buckmaster C, at 30 per Lord Atkinson and at 39 per Lord Parker.

3 As to representative proceedings see RSC Ord 15 r 12; and CIVIL PROCEDURE.

4 *Mercantile Marine Service Association v Toms* [1916] 2 KB 243, CA; *Hardie and Lane Ltd v Chiltern* [1928] 1 KB 663, CA; and see *Heatons Transport (St Helens) Ltd v Transport and General Workers Union*, *Craddock Bros v Transport and General Workers Union*, *Panalpina Services Ltd v Transport and General Workers Union* [1973] AC 15 at 45, [1972] 2 All ER 1214 at 1246, CA, per Lord Denning MR.

5 See eg *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA.

### **UPDATE**

#### **22-38 Parties**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/36. Trade unions, friendly societies and other associations.

### **36. Trade unions, friendly societies and other associations.**

Although a trade union is not a body corporate<sup>1</sup>, it can be sued in tort and can therefore be sued in libel and slander<sup>2</sup>. An employers' association, whether corporate or unincorporated<sup>3</sup>, may also be sued in tort<sup>4</sup>.

An action for libel against a friendly society is properly brought against the society in its registered name and not against the trustees<sup>5</sup>. A trustee savings bank could also be sued for libel<sup>6</sup>.

1 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 10(1); and EMPLOYMENT vol 40 (2009) PARA 852.

2 See *ibid* s 10(1)(b).

3 It may be either: see *ibid* s 127(1); and EMPLOYMENT vol 40 (2009) PARA 1029.

4 As to the liability of an unincorporated employers' association see *ibid* s 127(2)(b); and EMPLOYMENT vol 40 (2009) PARA 1029 head (2).

5 *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662. See also PARA 27 note 3 ante.

6 *Knight and Searle v Dove* [1964] 2 QB 631, [1964] 2 All ER 307; but see PARA 27 note 4 ante.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/37. Partners.

### 37. Partners.

Partners may be sued individually<sup>1</sup> or in the name of the firm. The firm is liable for the publication of a defamation by a partner acting in the ordinary course of business of the firm, or with the authority of his partners<sup>2</sup>.

1 *Meekins v Henson* [1964] 1 QB 472, [1962] 1 All ER 899.

2 See the Partnership Act 1890 s 10; and PARTNERSHIP vol 79 (2008) PARAS 65, 75.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(2) PARTIES/(ii) Who may be Sued/38. Joint and several liability.

### 38. Joint and several liability.

Every person who takes part in or procures the publication of a libel<sup>1</sup> is prima facie liable jointly and severally for all the damage caused by it<sup>2</sup>. Thus, if a libel appears in a newspaper, the author<sup>3</sup> of the libel and the proprietor<sup>4</sup>, editor<sup>5</sup>, printer<sup>6</sup>, publisher<sup>7</sup> and vendor<sup>8</sup> of the newspaper are prima facie jointly and severally liable.

Judgment recovered against any person liable in respect of any debt or damage is not a bar to an action, or to the continuance of an action, against any other person who is, apart from any such bar, jointly liable with him in respect of the same debt or damage<sup>9</sup>. If more than one action is brought, the plaintiff is not entitled to costs in any of those actions, other than that in which judgment is first given, unless in the court's opinion there was reasonable ground for bringing the action<sup>10</sup>. Subject to certain provisions<sup>11</sup>, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly with him or otherwise<sup>12</sup>. A plaintiff may accept money paid into court by one defendant and still continue the action against the others<sup>13</sup>, but, where the



plaintiff settles the action against one of several defendants, he must reserve all his rights against the other defendants if he wishes to continue the action against them<sup>14</sup>. Such a reservation of rights may, however, be implied<sup>15</sup>. Where the plaintiff sues persons jointly liable in one action and enters judgment against one defendant, he may continue the action against the other if the judgment against the first remains unsatisfied, but he cannot recover against the second defendant more than the amount of the judgment entered against the first defendant<sup>16</sup>.

1 As to publication and republication of a libel see the Defamation Act 1996 s 1; and PARA 60 et seq post. As to publication and repetition of a slander see PARAS 79-81 post.

2 *R v Paine* (1696) 5 Mod Rep 163 at 167.

3 *Bond v Douglas* (1836) 7 C & P 626.

4 *R v Walter* (1799) 3 Esp 21.

5 *Watts v Fraser* (1835) 7 C & P 369.

6 *Baldwin v Elphinston* (1775) 2 Wm Bl 1037.

7 *Morrison v Ritchie & Co* (1902) 4 F 645, Ct of Sess.

8 *Emmens v Pottle* (1885) 16 QBD 354 at 356-357, CA. As to the defence of innocent dissemination see PARA 159 post. See also *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566, [1977] 1 WLR 478, CA.

9 See the Civil Liability (Contribution) Act 1978 s 3; and CIVIL PROCEDURE.

10 See *ibid* s 4; and CIVIL PROCEDURE.

11 See *ibid* s 1(2)-(6); and DAMAGES.

12 *Ibid* s 1(1). As to agreements for indemnity against civil liability for libel see the Defamation Act 1952 s 11; and PARA 9 ante.

13 See RSC Ord 82 r 4; and PARAS 202-203 post.

14 *Gardiner v Moore* [1969] 1 QB 55, [1966] 1 All ER 365 (covenant not to sue); *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474 (accord and satisfaction). See also *Duck v Mayeu* [1892] 2 QB 511, CA.

15 *Gardiner v Moore* [1969] 1 QB 55, [1966] 1 All ER 365.

16 *Wall Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507, [1975] 2 All ER 257, PC; *Bryanston Finance Ltd v de Vries* [1975] QB 703, [1975] 2 All ER 609, CA.

## UPDATE

### 22-38 Parties

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(i) Reference to the Plaintiff/39. Statement must be published of and concerning the plaintiff.

## (3) DEFAMATORY STATEMENTS

## (i) Reference to the Plaintiff

### 39. Statement must be published of and concerning the plaintiff.

Words are not actionable as a libel or slander unless they are published of and concerning the plaintiff<sup>1</sup>. The plaintiff can rely only on the defamatory matter contained, whether expressly or by implication, in the statement in respect of which the action is brought and not on defamatory matter contained in statements made about the plaintiff by other persons on other occasions<sup>2</sup>. Where, however, a second similar libel is published in the same newspaper soon after the first, and clearly identifies the plaintiff, it may be taken into account to determine whether the first article also referred to him<sup>3</sup>. Where the plaintiff is referred to by name, or otherwise clearly identified, the words are actionable even if they were intended to refer to some other person<sup>4</sup>, and both the plaintiff and the other person may have a cause of action. However, it is not essential that the plaintiff should be named in the statement<sup>5</sup>. Where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of special facts could and did understand them to refer to him<sup>6</sup>; such facts are material facts<sup>7</sup>, must be pleaded in the statement of claim<sup>8</sup> and must be proved in evidence in order to connect the plaintiff with the words complained of<sup>9</sup>. Such a pleading is often called a 'reference innuendo' in contrast to a 'true innuendo' where the extrinsic facts only bear on the defamatory meaning<sup>10</sup>. In certain circumstances the plaintiff may be required to identify the persons who are alleged to know the special facts relied upon<sup>11</sup>. It is not essential that the special or extrinsic facts be known to those responsible for the publication<sup>12</sup> but the fact that they were unknown may well be relevant to the liability of a printer, distributor or secondary publisher<sup>13</sup> and also to the efficacy of a statutory offer of amends<sup>14</sup>.

1 *Knupffer v London Express Newspaper Ltd* [1944] AC 116, [1944] 1 All ER 495, HL. As to the meaning of 'words' see PARA 11 note 1 ante. As to group defamation see PARA 7 ante. As to the importance of using the words 'of and concerning' in statements of claim and indictments see *R v Horne* (1778) 2 Cowp 672, HL; *R v Alderton* (1756) 1756 Say 280, cited in *R v Horne* supra at 686 per Lord de Grey; *R v Marsden* (1815) 4 M & S 164; see also *Johnson v Aylmer* (1606) Cro Jac 126; *Craft v Boite* (1669) 1 Wms Saund (1871 Edn) 310 at 315 note (h), citing *Clement v Fisher* (1827) 7 B & C 459; *Jones v Stevens* (1822) 11 Price 235 at 276-277 per Wood B; *Hall v Blandy* (1827) 1 Y & J 480; and see PARA 60 note 3 post. In practice the words are never now omitted from the pleading.

2 See *Astaire v Campling* [1965] 3 All ER 666, [1966] 1 WLR 34, CA. As to forms of defamatory statement see PARAS 11-12 ante. As to what is defamatory see PARA 42 et seq post.

3 *Hayward v Thompson* [1982] QB 47, [1981] 3 All ER 450, CA.

4 *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377, [1939] 4 All ER 319, CA, where the words were true of the other person.

5 *Le Fanu v Malcomson* (1848) 1 HL Cas 637; cf *Turner v Meryweather* (1849) 7 CB 251; affd 19 LJCP 10, Ex Ch. If asterisks and initial letters are used and persons knowing the plaintiff understand that he is the person meant, there is a libel: *Bourke v Warren* (1826) 2 C & P 307.

6 See *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL.

7 RSC Ord 18 r 7; and see *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, [1977] 1 WLR 651, CA.

8 *Bruce v Odhams Press Ltd* [1936] 1 KB 697, [1936] 1 All ER 287, CA (if facts are not included the defendant is entitled to particulars).

9 See *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL; cf *Astaire v Campling* [1965] 3 All ER 666, [1966] 1 WLR 34, CA.

10 As to the 'true innuendo' see PARA 47 post.

11 *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, [1977] 1 WLR 651, CA.

12 *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, CA; *Ralston v Ralston* [1930] 2 KB 238. As to whether a defendant may be responsible for defamatory statements by other persons see *Astaire v Campling* [1965] 3 All ER 666, [1966] 1 WLR 34, CA.

13 See the Defamation Act 1996 s 1(5); and PARA 157 post.

14 See *ibid* s 4(3)(a); and PARA 163 post. At the date at which this volume states the law, s 4 had not been brought into force.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 39 Statement must be published of and concerning the plaintiff

NOTE 5--See also *Dwek v Macmillan Publishers Ltd; Dwek v Associated Newspapers Ltd* [2000] EMLR 284, CA (photograph of claimant with caption identifying him as someone else actionable).

NOTE 14--1996 Act s 4 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(i) Reference to the Plaintiff/40. Function of judge and jury in issues of identification.

#### 40. Function of judge and jury in issues of identification.

Where identification is in issue, it is for the judge to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff<sup>1</sup>. Such a ruling may be given at the trial, or at a preliminary hearing in chambers<sup>2</sup>. In determining this question, the judge must consider whether or not ordinary sensible persons, having the knowledge proved, could understand the words to refer to the plaintiff. If no reasonable person could have reasonably so understood the words, there is no question to be left to the jury, but if the words are such as could reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to, then it is for the jury to decide whether or not the words did in fact refer to him<sup>3</sup>.

The plaintiff is entitled to call witnesses at the trial to testify that they understood the words to refer to him<sup>4</sup>. He may also adduce evidence as to the effect of the words complained of on others<sup>5</sup>. It is for the jury to assess the witnesses and their reasonableness and to decide whether reasonable persons would reasonably understand that the plaintiff was referred to<sup>6</sup>. Where there is no jury the judge will decide the matter as a question of fact.

1 *Knupffer v London Express Newspaper Ltd* [1944] AC 116 at 121, [1944] 1 All ER 495 at 497, HL, per Viscount Simon LC ('a question of law'); *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at 1160, [1971] 1 WLR 1239 at 1242, HL, per Lord Reid ('a question reserved for the judge'); *Jones v Skelton* [1963] 3 All ER 952, [1963] 1 WLR 1362, PC. See also PARA 238 post.

2 *Id* under RSC Ord 82 r 3A: see further PARA 224 post. Such a preliminary ruling will not be appropriate when the question of identification turns on evidence extrinsic to the defamatory publication itself.

3 *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at 1168-1169, [1971] 1 WLR 1239 at 1252-1253, HL, per Lord Morris of Borth-y-Gest; *Jones v E Hulton & Co* [1909] 2 KB 444 at 454, CA, per Lord Alverstone CJ (a 'substantial number of persons'); affd [1910] AC 20, HL.

4 *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, CA; *Bottomley v Bolton* (1970) 115 Sol Jo 61, CA; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL.

5 *Cook v Ward* (1830) 4 Moo & P 99; *Du Bost v Beresford* (1810) 2 Camp 511 at 512. Similarly, in *Jozwiak v Sadek* [1954] 1 All ER 3, [1954] 1 WLR 275, evidence of statements made at public meetings and of anonymous telephone messages was admitted.

6 *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at 1169, [1971] 1 WLR 1239 at 1253, HL, per Lord Morris of Borth-y-Gest; *Jones v E Hulton & Co* [1909] 2 KB 444 at 454, CA, per Lord Alverstone CJ; affd [1910] AC 20, HL; *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, [1940] 3 All ER 31, CA (a case on defamatory meaning).

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(i) Reference to the Plaintiff/41. Unintentional reference to the plaintiff.

#### 41. Unintentional reference to the plaintiff.

In an action of libel or slander it is not generally necessary that the defendant should have actually intended to make or publish the statement of and concerning the plaintiff, or even that the defendant should have been aware of the plaintiff's existence, if people to whom it was published would reasonably understand it to refer to the plaintiff<sup>1</sup>. Where, however, the defendant is not the author, editor or commercial publisher of the words, but merely a printer, distributor or other secondary publisher, such absence of knowledge and intention to refer will be a factor relevant to liability<sup>2</sup>; and where a defendant has made a statutory offer of amends, proof that he knew or had reason to believe that his words referred to, or were likely to be understood to refer to, the plaintiff is one of the matters necessary to defeat the defence<sup>3</sup>.

1 *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL; see also *E Hulton & Co v Jones* [1910] AC 20, HL; *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, CA; *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 772, HL, per Lord Blackburn; *Harrison v Smith* (1869) 20 LT 713; *Latimer v Western Morning News Co* (1871) 25 LT 44; *Gibson v Evans* (1889) 23 QBD 384; *Shaw v London Express Newspaper Ltd* (1925) 41 TLR 475. As to how far the defendant's intention or motive is immaterial see PARA 17 ante. As to innuendo see PARAS 44, 47 post, and as to the use of asterisks see PARA 39 note 5 ante. See also *Astaire v Campling* [1965] 3 All ER 666, [1966] 1 WLR 34, CA.

2 See the Defamation Act 1996 s 1; and PARAS 157-158 post.

3 See *ibid* s 4(3)(a); and PARA 163 post. At the date at which this volume states the law, s 4 had not been brought into force.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **41 Unintentional reference to the plaintiff**

NOTE 3--1996 Act s 4 now in force: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(ii) What is Defamatory/42. Meaning of 'defamatory statements'.

### **(ii) What is Defamatory**

#### **42. Meaning of 'defamatory statements'.**

The essence of a defamatory statement is its tendency to injure the reputation of another person. There is no complete or comprehensive definition of what constitutes a defamatory statement, since the word 'defamatory' is nowhere precisely defined<sup>1</sup>. Generally speaking, a statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally<sup>2</sup> or if it exposes him to public hatred, contempt or ridicule<sup>3</sup> or if it causes him to be shunned or avoided<sup>4</sup>.

A person's reputation is not confined to his general character and standing but extends to his trade, business or profession, and words will be defamatory if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity<sup>5</sup>.

1 The leading British and other common law authorities are exhaustively reviewed by Neill LJ in *Berkoff v Burchill* [1996] 4 All ER 1008, CA. In that case, it was held that to call a well-known actor 'hideously ugly' was capable of being defamatory.

2 *Sim v Stretch* [1936] 2 All ER 1237 at 1240, HL, per Lord Atkin.

3 *Parmiter v Coupland* (1840) 6 M & W 105 at 108 per Parke B. As to the sufficiency of that definition see *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 477, CA, per Scrutton LJ; *Sim v Stretch* [1936] 2 All ER 1237 at 1240, HL, per Lord Atkin.

4 See eg *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, CA.

5 *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1104, [1970] 1 WLR 688 at 699, CA, per Pearson LJ. See also *Scott v Sampson* (1882) 8 QBD 491 at 503 per Cave J; *Berkoff v Burchill* [1996] 4 All ER 1008, CA.

### **UPDATE**

#### **39-59 Defamatory Statements**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(ii) What is Defamatory/43. The test of what is defamatory.

### **43. The test of what is defamatory.**

In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary person<sup>1</sup>. Having determined the meaning, the test is whether, under the circumstances in which the words were published, the reasonable person would be likely to understand them in a defamatory sense<sup>2</sup>. Words which tend to diminish the esteem in which a person is held by the criminal classes or by persons out of sympathy with the law will not support an action, for that is not a standard which the court can recognise<sup>3</sup>.

The fact that the particular person to whom the words were published did not believe them to be true is irrelevant and does not affect the right of action<sup>4</sup>, although it may affect the question of damages<sup>5</sup>.

Similarly, words will be defamatory if they impute conduct the reasonable person considers discreditable, even though in the author's stated view such conduct is proper<sup>6</sup>.

1 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 258, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 154, HL, per Lord Reid, and at 284 and 173 per Lord Devlin; see also *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 772, HL, per Lord Blackburn; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171, [1968] 1 All ER 497 at 504, CA, per Diplock LJ. As to the meaning of 'words' see PARA 11 note 1 ante.

2 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 745, HL, per Lord Selborne C. It is generally useless and often misleading to quote authorities to show that particular words have been held in particular cases to be defamatory, for their meaning may vary with the context and circumstances. Eg 'communist' probably was, but may now no longer be, defamatory, but even so, if the allegation is made of a plaintiff holding himself out as having right-wing views, the allegation could be defamatory by innuendo, ie that the plaintiff is a hypocrite. See also PARA 50 et seq post. As to cases which do not establish a principle but merely record the application of a principle to a particular set of facts see *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331 at 333, HL, per Lord Halsbury C; and *Glasgow Corp v Lorimer* [1911] AC 209 at 215, HL, per Lord Loreburn C.

3 *Mawe v Pigott* (1869) IR 4 CL 54; see also *Byrne v Deane* [1937] 1 KB 818, [1937] 2 All ER 204, CA.

4 *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 at 515, [1940] 3 All ER 31 at 35, CA, per Goddard LJ; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at 1163, [1971] 1 WLR 1239 at 1246, HL, per Lord Reid, and at 1168-1169 and 1252 per Lord Morris of Borth-y-Gest.

5 *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at 1168-1169, [1971] 1 WLR 1239 at 1252, HL, per Lord Morris of Borth-y-Gest.

6 *Botham v Khan* [1996] TLR 422, CA.

## **UPDATE**

### **39-59 Defamatory Statements**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **43 The test of what is defamatory**

NOTE 2--See *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694, [2004] EMLR 89 (a judge's ruling that certain words could not bear a less defamatory meaning meant that no reader could reasonably understand the words to bear that less defamatory meaning).

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#### **44. Meaning of the words.**

Before it is possible to determine whether or not particular words<sup>1</sup> bear a defamatory meaning, it is necessary to determine their meaning. For the purposes of the law of defamation, the fact that the same words can mean different things to different people is ignored; the court seeks to determine and act upon the one and only meaning that the readers as reasonable persons should have collectively understood the words to bear; this is the natural and ordinary meaning<sup>2</sup>. In determining the natural and ordinary meaning, the court takes into account not only the literal meaning of the words but also the inferences which a reasonable person would draw from them in their context<sup>3</sup>.

The words may also have a secondary or extended meaning which depends upon knowledge of special or extrinsic facts. The secondary or extended meaning is known as the innuendo, or true or legal innuendo.<sup>4</sup>

1 As to the meaning of 'words' see PARA 11 note 1 ante.

2 See *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 173, [1968] 1 All ER 497 at 505, CA, per Diplock LJ; approved in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, [1995] 2 All ER 313, HL.

3 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 280, sub nom *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 171, HL, per Lord Devlin. See eg *Chalmers v Payne* (1835) 2 Cr M & R 156 at 159 ('the bane and the antidote'). See also *Crowne v Warden & Co Ltd* (1968) 112 Sol Jo 824, CA (headlines and heavy type); and see PARA 46 post.

4 *R v Horne* (1778) 2 Cowp 672 at 684, HL, per Lord de Grey CJ; *Loughans v Odhams Press Ltd* [1963] 1 QB 299, [1962] 1 All ER 404, CA; *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, [1962] 2 All ER 380, CA; *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, sub nom *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151, HL; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, [1968] 1 All ER 497, CA; and see PARA 47 post.

### **UPDATE**

#### **39-59 Defamatory Statements**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **44 Meaning of the words**

NOTE 2--See *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694, [2004] EMLR 89 and PARA 43. Where the words are capable of having two meanings, one a higher imputation and the other a lesser, and the difference between the two is largely a matter of degree, the jury is entitled to consider both meanings: *Jameel v Times Newspapers Ltd* [2004] EWCA Civ 983, [2004] EMLR 665.

NOTE 3--See *Mitchell v Faber and Faber Ltd* [1998] EMLR 807, CA.

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#### **45. The entire publication.**

The reasonable reader, including viewers and listeners, is taken to have read the entire publication. It is not permissible to invite a jury to infer that some readers will only have read, for example, the headline, and will have understood that headline to bear a defamatory meaning which it would not have borne if considered in the context of the article as a whole<sup>1</sup>.

<sup>1</sup> *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, [1995] 2 All ER 313, HL.

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#### **46. Natural and ordinary meaning.**

The meaning of words for the purpose of the law of defamation is not a question of legal construction, since laymen will read into words an implication more freely than a lawyer<sup>1</sup>. The meaning is that which the words would convey to ordinary persons<sup>2</sup>. The ordinary person reads between the lines in the light of his general knowledge and experience of worldly affairs<sup>3</sup>. Thus, the interpretation of words may vary infinitely, and the right meaning is a question of fact<sup>4</sup>. However, words may be understood by one person in a different way from that in which they are understood by another<sup>5</sup>. Ordinary men and women have different temperaments and outlooks; some are unusually suspicious; some are unusually naive; and one must try to envisage people between those two extremes and determine what is the most damaging meaning they would put on the words in question<sup>6</sup>.

The court must not put a strained or unlikely construction upon the words<sup>7</sup>. If they are capable of bearing a number of good interpretations, it is unreasonable to seize upon the only bad one to give the words a defamatory sense<sup>8</sup>.

When a plaintiff complains of words in their natural and ordinary meaning he must accept that meaning with all the derogatory imputations that it conveys; the ordinary reader takes the imputations as a whole and does not divide them up<sup>9</sup>. Once the meaning has been determined, the court must decide whether the words complained of are defamatory of the plaintiff<sup>10</sup>.

<sup>1</sup> *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 277, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER



151 at 169, HL, per Lord Devlin; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171, [1968] 1 All ER 497 at 503, CA, per Diplock LJ. See also PARA 44 ante. As to the functions of judge and jury see PARA 238 post.

2 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 258, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 154, HL, per Lord Reid, and at 284 and 173 per Lord Devlin; see also *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 772, HL, per Lord Blackburn; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, [1968] 1 All ER 497, CA.

3 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 258, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 154, HL, per Lord Reid.

4 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 172, [1968] 1 All ER 497 at 504, CA, per Diplock LJ.

5 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171, [1968] 1 All ER 497 at 504, CA, per Diplock LJ.

6 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 259, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 155, HL, per Lord Reid; and see *Hartt v Newspaper Publishing plc* (1989) Times, 9 November, CA.

7 *Stubbs Ltd v Russell* [1913] AC 386 at 398, HL, per Lord Shaw of Dunfermline.

8 *Capital and Counties Bank v Henty & Sons* (1880) 5 CPD 514 at 541, CA, per Brett LJ.

9 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 168, [1968] 1 All ER 497 at 502, CA, per Lord Denning MR; *S and K Holdings Ltd v Throgmorton Publications Ltd* [1972] 3 All ER 497 at 500, [1972] 1 WLR 1036 at 1039, CA, per Lord Denning MR.

10 See PARAS 42-43 ante.

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#### 47. The true or legal innuendo.

The term 'innuendo' has two distinct usages, one substantive, one of pleading significance only. The 'true' or 'legal' innuendo is a separate defamatory meaning, different from the natural and ordinary meaning because it is apparent only to those readers possessed of special knowledge of extrinsic facts unknown to the ordinary person<sup>1</sup>. The 'false' or 'popular' innuendo is a convention of pleading, whereby the plaintiff sets out in the statement of claim the natural and ordinary meaning, especially when that meaning includes inferences going beyond the literal meaning<sup>2</sup>.

The natural and ordinary meaning and the legal innuendo give rise to separate causes of action<sup>3</sup>. It is sometimes difficult to differentiate between the two as, for example, with slang words which sometimes begin by having a special meaning known to a particular group of people and then later the special meaning becomes one of general knowledge, which indicates that the meaning can pass from the category of innuendo to the category of natural and ordinary meaning<sup>4</sup>. Generally, it is necessary to plead an innuendo where slang or technical or

foreign words are complained of, where there are accompanying gestures<sup>5</sup> or where there are extrinsic facts.

1 *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 at 328, [1962] 2 All ER 380 at 390, CA, per Holroyd Pearce LJ; *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 277, 280, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 169, 171, HL, per Lord Devlin (the pleading of the words and the meanings). The special facts must be pleaded: see RSC Ord 82 r 3(1).

2 As to the pleading of meanings see PARA 178 post.

3 *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, [1962] 2 All ER 380, CA; *Watkin v Hall* (1868) LR 3 QB 396 at 402 per Blackburn J. The distinction is of dubious value in modern times: *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 279, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 170, HL, per Lord Devlin.

4 Eg *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161, [1972] 2 All ER 26, CA (the meaning of the word 'bent'); see also *Dakhyl v Labouchere* [1908] 2 KB 325n, HL ('quack').

5 *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 at 328, [1962] 2 All ER 380 at 390, CA, per Holroyd Pearce LJ.

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#### 48. Function of judge and jury in deciding the meaning of words.

It is for the judge to rule whether or not the words are reasonably capable of bearing a meaning defamatory of the plaintiff<sup>1</sup>. If he rules that they are so capable, it is for the jury, or the judge if he is sitting without a jury, to decide whether the words did in fact bear a meaning defamatory of the plaintiff<sup>2</sup>.

Where the plaintiff relies on the natural and ordinary meaning, which includes the inferential meaning, no evidence is admissible as to the meaning of the words; but where the plaintiff relies on a 'true' innuendo meaning and adduces evidence of special facts to support it, witnesses may be called to testify as to the meaning they understand the words to bear<sup>3</sup>.

1 Such a ruling may be given at trial or at a preliminary hearing in chambers under RSC Ord 82 r 3A: see PARA 224 post.

2 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151, HL; *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, [1962] 2 All ER 380, CA. That which may tend to lower the plaintiff in the estimation of others cannot be withheld from a jury: *Fray v Fray* (1864) 17 CBNS 603 at 605; cf *Hoare v Silverlock* (1848) 12 QB 624 at 634; *Sim v Stretch* [1936] 2 All ER 1237 at 1240, HL; *Holdsworth Ltd v Associated Newspapers Ltd* [1937] 3 All ER 872, CA. See also PARA 238 post.

3 *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 at 515, [1940] 3 All ER 31 at 35, CA, per Goddard LJ; *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, CA. The jury is entitled to reject the evidence of such witnesses.

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#### 49. Words of heat, vulgar abuse, irony and sarcasm.

A person may use strong language of another, which if taken literally would be defamatory, but if it is obvious to the reasonable viewer or reader, from the tone and context, that the words are not intended literally but merely as insults, then the natural and ordinary meaning conveyed will not be a defamatory one<sup>1</sup>. This principle is sometimes called the 'defence of mere vulgar abuse' but in fact it is a doctrine of interpretation going to exclude liability. By a similar principle, apparently defamatory words may be published in an obviously sarcastic or ironic manner so as to be deprived of their defamatory meaning; though more commonly the effect of irony or sarcasm is to render defamatory apparently innocent expressions.

Whether words make a definite charge of misconduct, or are merely abusive or sarcastic, depends on all the circumstances of the case<sup>2</sup>.

1 *Penfold v Westcote* (1806) 2 Bos & PNR 335; *Christie v Robertson* (1899) 1 F 1155, Ct of Sess (effect of words spoken in heat). See also PARA 44 ante.

2 See the cases cited in note 1 supra.

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#### 50. Statement imputing fraud, dishonesty etc.

It is defamatory to charge another with fraudulent, dishonest or dishonourable conduct or motives<sup>1</sup>, or to call a person a villain<sup>2</sup>, swindler<sup>3</sup>, rogue or rascal<sup>4</sup>, or to state that he is not conversant with business ethics<sup>5</sup>. It is also defamatory, though considerably less serious, to

suggest that a person is being investigated by the authorities, or is under suspicion of dishonesty or crime, even if the reasonable reader would not infer outright guilt<sup>6</sup>.

1 *Bendle v United Kingdom Alliance* (1915) 31 TLR 403, CA. See also PARA 58 post.

2 *Bell v Stone* (1798) 1 Bos & P 331.

3 *J'Anson v Stuart* (1787) 1 Term Rep 748.

4 *Villers v Monsley* (1769) 2 Wils 403 at 404 per Gould J. However, as to mere words of heat or vulgar abuse see PARA 49 ante.

5 *Angel v HH Bushell & Co Ltd* [1968] 1 QB 813, [1967] 1 All ER 1018.

6 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, sub nom *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151, HL.

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#### 51. Imputation of anti-social behaviour.

It is defamatory to state of a person, in time of war, that he is an alien enemy<sup>1</sup>. It has also been held that it is defamatory to impute to a person disloyalty to his fellow workers during a strike<sup>2</sup>. It is defamatory to state that a person is racially prejudiced<sup>3</sup>.

Having regard to the present standard of public opinion, it will probably depend upon the context as to whether or not a statement alleging intemperance is defamatory<sup>4</sup>. It has been held to be libellous to charge a plaintiff with hypocrisy, malice, lack of charity and falsehood<sup>5</sup>, and an imputation of ingratitude has been held to be defamatory<sup>6</sup>.

1 *Hambourg v London Mail Ltd* (1914) Times, 29 October; *Brunner v Palmer* (1914) Times, 9 December; *Re Bechstein, Berridge v Bechstein* (1914) 58 Sol Jo 863; *J Lyons & Co Ltd v Lipton Ltd* (1914) 49 LJo 542; *Slazengers Ltd v C Gibbs & Co* (1916) 33 TLR 35.

2 *Mycroft v Sleight* (1921) 90 LJB 883.

3 *De Stempel v Dunkels* [1938] 1 All ER 238, CA; affd (1939) 55 TLR 655, HL (person called 'a Jew-hater').

4 See *Alexander v Jenkins* [1892] 1 QB 797 at 799-800, 803, 805, CA, where there was an imputation in a slander action of habitual drunkenness on the part of a town councillor, which is an office of honour not of profit. See also the Defamation Act 1952 s 2; para 57 post; and *Robinson v Ward* (1958) 108 LJo 491. It is for the court to decide as a question of fact in an action for libel what is a sufficient imputation of intemperance: see *Ritchie & Co v Sexton* (1891) 64 LT 210, HL.

5 *Thorley v Lord Kerry* (1812) 4 Taunt 355 at 357. As to intolerance see *Teacy v M'Kenna* (1869) IR 4 CL 374. As to falsehood cf *Hancock v Stephens* (1915) 31 TLR 434 at 435, CA, for circumstances in which it was held that there was no case to go to the court to decide as a question of fact.

6 *Hoare v Silverlock* (1848) 12 QB 624 ('frozen snake'); *Cox v Lee* (1869) LR 4 Exch 284 (ingratitude). See also *Forbes v King* (1833) 1 Dowl 672 (degradation and subservience).

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 51 Imputation of anti-social behaviour

NOTE 5--See *Freeguard v Martlet Homes Ltd* [2008] All ER (D) 55 (Dec), CA (words 'let me know if he is abusive to you' did not imply person was naturally abusive and were not defamatory).

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### 52. Imputation of sexual immorality.

Since the primary test of whether words are defamatory is whether they lower the plaintiff's reputation in the eyes of right-thinking members of society, changes in social attitude will determine whether allegations once considered defamatory continue to be so. This principle is of particular importance in the field of sexual morality<sup>1</sup>. Allegations of sexual conduct in breach of the criminal law, or of lawful sexual activity linked to other classes of misconduct such as hypocrisy or betrayal, will, however, remain defamatory despite such shifts in public attitudes<sup>2</sup>. An allegation that a woman had been the victim of rape was formerly held defamatory, not as imputing misconduct but because it would lead to her being avoided<sup>3</sup>, but it is questionable whether this authority would now be followed.

1 See *Stephens v Avery* [1988] Ch 449 at 453, [1988] 2 All ER 477 at 480 per Sir Browne-Wilkinson V-C ('in 1915 there was a code of sexual morals accepted by the overwhelming majority of society. A judge could therefore stigmatise certain sexual conduct as offending that moral code. But at the present day no such general code exists. There is no common view that sexual conduct of any kind between consenting adults is grossly immoral'). As to the enforcement of an obligation of confidentiality between sexual partners see *Stephens v Avery* supra and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 436.

2 It is doubtful whether an imputation of homosexuality per se is still defamatory; older authorities in the field of sexual morality are to be treated with great caution: see *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477.

3 *Youssouf v Metro-Goldwyn Mayer Pictures Ltd* (1934) 50 TLR 581, CA. As to the statutory restrictions on the reporting of rape offences and the victim's or alleged victim's right to anonymity see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1918.

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### **53. Imputation of physical or mental illness.**

It is not defamatory to allege that a person is suffering from physical illness, unless it is a serious infectious disease which would cause him to be shunned or avoided<sup>1</sup> or a disease usually contracted as the result of sexual or other misconduct<sup>2</sup>.

An allegation of insanity or serious mental illness will generally be defamatory<sup>3</sup> especially if it carries with it the inference of unfitness to pursue one's trade or profession<sup>4</sup>.

1 *Watkin v Hall* (1868) LR 3 QB 396.

2 *Bloodworth v Gray* (1844) 7 Man & G 334.

3 *R v Harvey and Chapman* (1823) 2 B & C 257 at 258 (criminal libel of the King). Changes in social attitudes to mental illness may affect this proposition: cf para 52 note 1 ante.

4 *Morgan v Lingen* (1863) 8 LT 800 at 901 per Martin B.

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### **54. Statements imputing financial difficulty.**

A statement that a person, even though he is not a trader, is in pecuniary difficulties<sup>1</sup>, or that he cannot pay his debts<sup>2</sup>, may be defamatory<sup>3</sup>. However, it is not defamatory to make a statement of another which merely imputes that he has debts<sup>4</sup>, or that he quitted a neighbourhood leaving debts unpaid, but it is clearly defamatory to state that he bolted or suddenly left the neighbourhood leaving his debts unpaid<sup>5</sup>, and it has been held defamatory to say of an innkeeper that he is insolvent<sup>6</sup>. The words 'refer to drawer' placed on a cheque by the drawer's bank have been held to be defamatory of the drawer<sup>7</sup>.

1 It would seem that a written statement that a person was once in pecuniary difficulties is libellous although it is also stated that a loan he obtained has been honourably repaid: *Cox v Lee* (1869) LR 4 Exch 284 at 288 per Kelly CB. In *Leycroft v Dunker* (1633) Cro Car 317, an oral imputation that the plaintiff came a broken merchant from Hamburg was held actionable on the ground that he who has once been bad is always presumed to be bad in the same way.

2 An imputation of insolvency is clearly defamatory: *Eaton v Johns* (1842) 1 Dowl NS 602. See also *Brown v Smith* (1853) 13 CB 596.

3 For a modern example in which the allegation was held to be a serious libel see *Kiam v Neill* [1996] TLR 461. See also PARA 57 post.

4 *R v Coghlan* (1865) 4 F & F 316 at 322 per Bramwell B; *M'Cann v Edinburgh Roperie and Sailcloth Co* (1889) 28 LR Ir 24, CA. As to pleading the innuendo see PARA 179 et seq post. See also *Speake v Hughes* [1904] 1 KB 138, CA, where the special damage alleged (dismissal from employment) was held to be too remote. Words suggesting that the plaintiff had borrowed money from his housemaid and had failed to pay her wages were held not to be actionable in *Sim v Stretch* [1936] 2 All ER 1237 at 1240, HL; applied in *Holdsworth Ltd v Associated Newspapers Ltd* [1937] 3 All ER 872, CA.

5 As to the distinction between a libel as alleged in the statement of claim imputing, by the word 'bolting', a fraudulent evasion by the plaintiff of his creditors, he being unable to pay them, and the word 'quitting' used in the defence of justification, which was held bad on general demurrer, as 'quitting' would be an innocent departure and consistent with proof that the plaintiff left town for the day but then returned and paid his debts, see *O'Brien v Bryant* (1846) 16 M & W 168.

6 *Whittington v Gladwin* (1826) 5 B & C 180; *Hall v Smith* (1813) 1 M & S 287 (place held immaterial); *Figgins v Cogswell* (1815) 3 M & S 369 (plaintiff of two trades: slander proved of one sufficient).

7 *Jayson v Midland Bank Ltd* [1968] 1 Lloyd's Rep 409, CA. See also *Pyke v Hibernian Bank Ltd* [1950] IR 195, where Haugh J left the matter to the jury who awarded damages, and the Court of Appeal was evenly divided, so the appeal failed; *Szek v Lloyds Bank Ltd* (1908) 29 Journal of Institute of Bankers 123; and *Sterling v Barclays Bank Ltd* (1930) Times, 18 July, where it appears not to have been disputed that the words were defamatory; *Hill v National Bank of New Zealand Ltd* [1985] 1 NZLR 736. See also *Allen v London County and Westminster Bank Ltd* (1915) 84 LJBK 1286. The words were held to be defamatory in *Flach v London and South-Western Bank Ltd* (1915) 31 TLR 334 at 336 (but note the existence of the moratorium at that time). See also *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107, [1936] 1 All ER 653. In *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316, the words 'not sufficient' were conceded to be defamatory. As to 'present again' see *Baker v Australia and New Zealand Bank Ltd* [1958] NZLR 907. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 845.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(ii) What is Defamatory/55. Statement disparaging property or goods.

#### 55. Statement disparaging property or goods.

A statement which merely disparages a person's property or goods may give rise to an action for slander of title or goods or other malicious falsehood<sup>1</sup>, but not to an action of libel or slander properly so called<sup>2</sup>. However, a statement which at first sight appears only to disparage a person's property or goods may be such as reasonably to convey to those to whom it is published a meaning defamatory of the plaintiff personally<sup>3</sup> or disparaging him in any office, profession, calling, trade or business held or carried on by him at the time of the publication<sup>4</sup>. Thus, it may be defamatory if it is stated that a meat wine, advertised as 'really genuinely nutritive', is not in fact strengthening<sup>5</sup>, that decomposed fish are habitually sold at a particular fishmonger's shop, that a particular baker's bread is always unwholesome<sup>6</sup> or that a wine merchant's judgment in the selection of wine was bad<sup>7</sup>. It is a question of meaning, for the jury, whether the words reflect on the trader or merely disparage his goods<sup>8</sup>.

1 As to such actions see PARA 274 et seq post; and see *Joyce v Sengupta* [1993] 1 All ER 897, [1993] 1 WLR 337, CA.

2 *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL; *Griffiths v Benn* (1911) 27 TLR 346, CA; *Cellactite and British Uralite Ltd v HH Robertson & Co Ltd* (1957) Times, 23 July, CA. See also *Lyne v Nicholls* (1906) 23 TLR 86; *Alcott v Millar's Karri and Jarrah Forests Ltd* (1904) 91 LT 722, CA.

3 *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL, where it was pointed out that in *Harman v Delany* (1731) 2 Stra 898, there was in the court's opinion a reflection on the plaintiff, whereas in *Evans v Harlow* (1844) 5 QB 624 there was not. See also *Jenner v A'Beckett* (1871) LR 7 QB 11.

4 As to such statements see PARA 57 post.

5 *Bendle v United Kingdom Alliance* (1915) 31 TLR 403, CA.

6 *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331 at 333, HL, per Lord Halsbury LC.

7 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139, CA, per Lord Esher MR.

8 *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL; and see *Griffiths v Benn* (1911) 27 TLR 346, CA. See also *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 139, CA, per Lord Esher MR (condition of cottages in a colliery village); *Ingram v Lawson* (1840) 6 Bing NC 212; and *Australian Newspaper Co v Bennett* [1894] AC 284, PC; *Heriot v Stuart* (1796) 1 Esp 437.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(iii) Slander Actionable Per Se/56. Slander imputing crime punishable by imprisonment.

### (iii) Slander Actionable Per Se

#### 56. Slander imputing crime punishable by imprisonment.

An action will lie without proof of special damage at the suit of a person of and concerning whom<sup>1</sup> an oral imputation has been made and published that he has committed a crime punishable by imprisonment<sup>2</sup>. The distinction is not between indictable and non-indictable offences, but between offences for which a person can be made to suffer by imprisonment and those for which the punishment is the mere imposition of a fine<sup>3</sup>. It makes no difference in the case of an offence punishable by imprisonment that a fine may be imposed in addition or in the alternative nor, in the case of an offence punishable by fine, that imprisonment may be ordered for non-payment of the fine<sup>4</sup> or that it involves a liability to arrest for a summary offence<sup>5</sup>. However, spoken words which convey a mere suspicion that the plaintiff has committed a crime punishable by imprisonment will not support an action without proof of special damage<sup>6</sup>. When the words admit fairly of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury<sup>7</sup>. The intention of the speaker is irrelevant<sup>8</sup>. It is not actionable per se to impute to the plaintiff a mere



intention or inclination to commit a crime, but it is actionable per se to impute an attempt or solicitation to commit a crime which is itself a crime punishable by imprisonment<sup>9</sup>.

It is sufficient if the words impute that the plaintiff has committed a crime punishable by imprisonment even if the exact crime is not specified<sup>10</sup>. If the plaintiff's guilt is imputed, it matters not that the charge is made in an oblique way or by way of question or conjecture, by an epithet or by way of report or exclamation<sup>11</sup>. The court will properly consider the whole of the conversation<sup>12</sup>.

It is not actionable per se to impute by spoken words that a person is a swindler or a villain, or dishonest or fraudulent, if an offence is not imputed which is punishable by imprisonment or if the imputation is not calculated to disparage the plaintiff in the way of his trade<sup>13</sup>.

1 See PARA 39 note 1 ante.

2 *Holt v Scholefield* (1796) 6 Term Rep 691; *Webb v Beavan* (1883) 11 QBD 609; *Hellwig v Mitchell* [1910] 1 KB 609 at 612 per Bray J; *Ormiston v Great Western Rly Co* [1917] 1 KB 598; cf *Mandelston v North British Rly Co* 1917 SC 442. The basis of the action is not that the words put the defamed person in jeopardy of a criminal prosecution, but that they lead to social ostracism: *Gray v Jones* [1939] 1 All ER 798.

3 *Webb v Beavan* (1883) 11 QBD 609 at 610; *Michael v Spiers and Pond Ltd* (1909) 101 LT 352. See also Com Dig, action upon the Case for Defamation (D5).

4 See the Canadian cases of *Robertson v Robertson* [1921] 1 WWR 1151; *McDonald v Mulqueen* (1922) 53 OLR 191, in which the English authorities are reviewed.

5 *Hellwig v Mitchell* [1910] 1 KB 609.

6 *Tozer v Mashford* (1851) 6 Exch 539; *Simmons v Mitchell* (1880) 6 App Cas 156 at 162, PC. As to the distinction between reporting a suspicion and repeating a rumour see *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 274-275, sub nom *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 167-168, HL, per Lord Hodson; and see at 285 and 173-174 per Lord Devlin (it is incorrect to say as a matter of law that a statement of suspicion imputes guilt, but as a matter of practice it very often does so; a man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire, but it can be done).

7 *Simmons v Mitchell* (1880) 6 App Cas 156 at 162, PC; *Daines and Braddock v Hartley* (1848) 3 Exch 200 (approved in *Simmons v Mitchell* supra at 163), where it was expressly ruled that a witness may not be asked with respect to spoken words in a slander case 'What did you understand by those words?'. The question 'Was there anything to prevent the words from conveying the meaning which ordinarily they would convey?' may be put, and if it appears that there was something, the question may then be put 'What did you understand by them?': *Daines and Braddock v Hartley* supra at 206 per Pollock CB. See also RSC Ord 82 r 3(1); and PARA 179 post.

8 See PARA 17 ante. A person charged with libel cannot defend himself by showing that he intended in his own mind not to defame, or that he intended not to defame the plaintiff, if in fact he did both: see *E Hulton & Co v Jones* [1910] AC 20 at 23, HL, per Lord Loreburn C. The same principle applies to slander. As to the immateriality of the speaker's intention see *Hankinson v Bilby* (1847) 16 M & W 442; and as to his secret reservations see *Read v Ambridge* (1834) 6 C & P 308. Intention is, however, of relevance to the defence of offer of amends: see the Defamation Act 1996 s 4(3); and PARA 163 post. At the date at which this volume states the law, s 4 had not been brought into force.

9 *R v Scofield* (1784) Cald Mag Cas 397 per Lord Mansfield CJ; *Harrison v Stratton* (1802) 4 Esp 218. It is otherwise in the case of treason, for the intent is treason: Com Dig, Action upon the Case for Defamation (D1); and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 4-5.

10 *Curtis v Curtis* (1834) 10 Bing 477 at 478; *Francis v Roose* (1838) 3 M & W 191. See also *Webb v Beavan* (1883) 11 QBD 609. An action lay for saying of the plaintiff that 'he is a returned convict': *Fowler v Dowdney* (1838) 2 Mood & R 119. See also *Gray v Jones* [1939] 1 All ER 798, where 'You are a convicted person; you have a conviction' was held actionable per se.

11 See the illustrations under those headings in Com Dig, Action upon the Case for Defamation (E); and PARA 182 post. As to words which are and are not actionable per se see Com Dig, Action upon the Case for Defamation (D), (F); Bac Abr, Slander (B) 1.

12 *Shipley v Todhunter* (1836) 7 C & P 680; *Thompson v Bernard* (1807) 1 Camp 48; see also *Cristie v Cowell* (1790) Peake 4, where the transaction was a mere breach of contract.

13 In the following cases it was held that the words spoken were not actionable per se, although all these cases must be read subject to the Defamation Act 1952 s 2 (see PARA 57 post): 'welsher' (*Blackman v Bryant* (1872) 27 LT 491, where the innuendo was insufficient); 'blackleg' (*Barnett v Allen* (1858) 3 H & N 376, Martin and Bramwell BB dissenting); 'he has defrauded a mealman of a roan horse' (*Richardson v Allen* (1774) 2 Chit 657); 'his shop is in the market' (ie the plaintiff, a grocer, is selling up with the intention of defrauding his Christmas Club subscribers) (*Ruel v Tatnell* (1880) 43 LT 507, DC); 'you are a regular prover under bankruptcies' (*Angle v Alexander* (1830) 7 Bing 119). In *Sibley v Tomlins* (1833) 4 Tyr 90, the court found that the following words did not impute a crime: 'You are a bloody thief. Who stole F's pigs? You did, you bloody thief, and I can prove it; you poisoned them with mustard and brimstone'. If one calls another a thief together with other names of general abuse, no evidence being given to explain in what sense the word 'thief' is used, the court will not set aside a verdict for the plaintiff: *Penfold v Westcote* (1806) 2 Bos & PNR 335. It has been held actionable per se to say of the plaintiff, 'He is a thief and robbed me of my bricks' (*Slowman v Dutton* (1834) 10 Bing 402); 'You robbed me, for I found the thing you have done it with' (*Rowcliffe v Edmonds* (1840) 7 M & W 12); 'He robbed JW' (*Tomlinson v Brittlebank* (1833) 4 B & Ad 630); 'He was put in the round house for stealing ducks at Crowland' (*Beavor v Hides* (1766) 2 Wils 300); 'You're a thief and robbed JC of his money' (*Atkinson v Newton* (1854) 3 WR 14). It was held not actionable to say of a churchwarden who had the possession of bell-ropes, 'Who stole the parish bell-ropes?' the innuendo being that the plaintiff, while churchwarden, had stolen the parish bell-ropes, which, having regard to his possession, was not possible: *Jackson v Adams* (1835) 2 Bing NC 402. It has been held actionable per se to say of the plaintiff 'You are a rogue, and I will prove you are a rogue, for you forged my name' (*Jones v Herne* (1759) 2 Wils 87); but not to say 'I will take him to Bow Street on a charge of forgery' without an innuendo charging the plaintiff with a crime (*Harrison v King* (1817) 4 Price 46, Ex Ch, per Gibbs CJ, citing *Wood v Merrick* (1627) 1 Roll Abr 73 pl 21, and *Poland v Mason* (1620) Hob 305, 326). See also the cases cited in the note to *Harrison v King* (1817) 4 Price 46, Ex Ch, per Gibbs CJ, as reported in 7 Taunt 431 at 432; *Stockley v Clement* (1827) 4 Bing 162. As to what amounts to a charge of bigamy see *Heming v Power* (1842) 10 M & W 564 (action for slandering the plaintiff's wife). As to statements imputing murder or manslaughter see *Oldham v Peake* (1774) 2 Wm Bl 959; affd (1775) 1 Cowp 275; *Ford v Primrose* (1824) 5 Dow & Ry KB 287, where the following words were held actionable per se, '... he (the plaintiff) murdered his first wife, that is, he administered improper medicines to her for a certain complaint, which was the cause of her death'. It is actionable per se to say of the plaintiff that he was perjured (*Holt v Scholefield* (1796) 6 Term Rep 691), or that he was under charge of a prosecution for perjury, and that the Attorney General had given directions to prosecute the plaintiff for perjury (*Roberts v Camden* (1807) 9 East 93); but it is not actionable per se merely to say of another that he is forsworn (*Holt v Scholefield* supra; *Hall v Weedon* (1826) 8 Dow & Ry KB 140), unless the words were spoken with reference to some judicial proceeding in which the plaintiff had been sworn (*Holt v Scholefield* supra); cf *Stanhope v Blith* (1585) 4 Co Rep 15a. For a case where it was held that the plaintiff was not a person amenable to a charge of embezzlement see *Williams v Stott* (1833) 1 Cr & M 675. It is actionable per se to impute that the plaintiff has brought a blackmailing action: *Marks v Samuel* [1904] 2 KB 287, CA. When considering old cases it must be borne in mind that the usage of words can change over the years; thus 'villain' in contemporary slang can connote a professional criminal whereas its meaning in earlier days was less specific.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 56 Slander imputing crime punishable by imprisonment

NOTE 8--1996 Act s 4 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(iii) Slander Actionable Per Se/57. Slander disparaging official, professional or business reputation.

### 57. Slander disparaging official, professional or business reputation.

In an action for slander in respect of words<sup>1</sup> calculated to disparage the plaintiff in any office, profession, calling, trade or business<sup>2</sup> held or carried on by him at the time of the publication<sup>3</sup>, it is not necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business<sup>4</sup>.

It appears that this provision applies to offices of profit and offices of honour alike but, in the case of an office of honour, it is still necessary that the words should impute some want of integrity or some corrupt or dishonest conduct in the discharge of that office<sup>5</sup>. It is, therefore, necessary to bear in mind the old distinction between these two types of office<sup>6</sup>.

A statement so disparages a person if it imputes to him the lack of some general essential quality for the office, such as honesty, fidelity, capacity, competence<sup>7</sup>, experience<sup>8</sup>, qualification, knowledge, skill, judgment or efficiency<sup>9</sup> or the like, or connects the imputation with the plaintiff's office<sup>10</sup>.

It is also still the law that a slander is actionable per se if the words were published of the plaintiff in the way of his office or calling and in relation to his conduct in and imputed unfitness for or misconduct in that office or calling<sup>11</sup>.

1 'Words' include pictures, visual images, gestures and other methods of signifying meaning: Defamation Act 1952 s 16(1). However s 2 (see the text and notes 2-4 infra) is confined to actions for slander, so the methods must, in this case, be of an impermanent nature.

2 The trade must be lawful: *Hunt v Bell* (1822) 1 Bing 1.

3 See *Tuthill v Milton* (1609) Yelv 158, where the plaintiff was a linen draper; *Moore v Synne* (1620) 2 Roll Rep 84; *Collis v Malin* (1632) Cro Car 282, where it was found for the defendant on a point of pleading; *Jones v Stevens* (1822) 11 Price 235, where it was held that an attorney who had omitted for more than a year to take out a practising certificate was still an attorney at the date of the publication, although he could not legally conduct cases for the time being; *Bellamy v Burch* (1847) 16 M & W 590, a slander action by a renter of tolls. Certain old actions for libel where damages were awarded for statements reflecting on the plaintiff in the discharge of a former office will be found on examination to have been cases where the libel was on the plaintiff in his personal capacity, as a man; *Hopwood v Muirson* [1945] KB 313, [1945] 1 All ER 453, CA; *Boydell v Jones* (1838) 4 M & W 446, where the defendant contended that the statement of claim ought to have gone on to allege that the plaintiff continued to practise as an attorney, but Parke B said: 'Suppose he had ceased to practise as an attorney--this is not an action for words, but for a libel. This is a libel on him as a man'. In *Parmiter v Coupland* (1840) 6 M & W 105 at 108, Parke B, by his definition of libel, seemed to treat the case as one of a libel on the plaintiff as a man, so far as concerned the question whether the words were defamatory.

4 Defamation Act 1952 s 2. The effect of this provision is, in the case of defamatory words spoken of a professional or business person, to abolish the old requirement of proof of special damage where the defamatory words were not spoken of him in the way of his profession or business. See also *Hopwood v Muirson* [1945] KB 313, [1945] 1 All ER 453, CA; *Jones v Jones* [1916] 2 AC 481 at 500, HL, per Lord Sumner; *Dauncey v Holloway* [1901] 2 KB 441, CA; and see Com Dig, Actions on the Case for Defamation (D27).

5 See *Robinson v Ward* (1958) 108 L Jo 491.

6 See eg *Booth v Arnold* [1895] 1 QB 571 CA, where an alderman was alleged to have used his office for the purpose of dishonestly procuring an advantage for himself; *Alexander v Jenkins* [1892] 1 QB 797, CA, where habitual intemperance was imputed to a councillor. In relation to offices of honour, eg the office of sheriff, alderman or councillor, a clear distinction was drawn between imputations of incapacity or unfitness for office and imputations of lack of integrity or misconduct in office: see eg *Onslow v Horne* (1771) 2 Wm 750; *Gallwey v Marshall* (1853) 9 Exch 294. Firewatching is a duty but has been held not to constitute an office: *Cleghorn v Sadler* [1945] KB 325, [1945] 1 All ER 544. The office, trade or calling, if lawful, need not be one of which the court will take judicial notice: *Foulger v Newcomb* (1867) LR 2 Exch 327 at 330.

7 *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, [1970] 1 WLR 688, CA (dentist).

8 *Botterill v Whytehead* (1879) 41 LT 588 (architect); *Sadgrove v Hole* [1901] 2 KB 1, CA.

9 *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1104, [1970] 1 WLR 688 at 699, CA, per Pearson LJ, where the relevant considerations are clearly and concisely set out, citing *Harman v Delany* (1731) 2 Stra 898; *Edsall v Russell* (1842) 4 Man & G 1090; *Botterill v Whytehead* (1879) 41 LT 588; *Linotype Co*

*Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, CA; *Griffiths v Benn* (1911) 27 TLR 346, CA; *Dauncey v Holloway* [1901] 2 KB 441 at 447, CA; *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 477, CA, per Scrutton LJ.

10 *Lumby v Allday* (1831) 1 Cr & J 301 at 305 per Bayley B, approved in *Ayre v Craven* (1834) 2 Ad & El 2; *Miller v David* (1874) LR 9 CP 118 at 125; *Alexander v Jenkins* [1892] 1 QB 797 at 800, CA.

11 See PARA 20 text and note 3 ante.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(iii) Slander Actionable Per Se/58. Slander imputing sexual immorality.

#### 58. Slander imputing sexual immorality.

A defamatory allegation of sexual misconduct against a man is not actionable per se unless the misconduct in question would constitute a criminal offence<sup>1</sup> or indicate unfitness for his office or profession<sup>2</sup>.

An imputation of unchastity or adultery against a woman or girl is actionable per se<sup>3</sup>. Unchastity has been held to include lesbianism<sup>4</sup> and the conception of a child outside wedlock<sup>5</sup>; but not all allegations of extramarital sexual activity by a woman would now be regarded as defamatory or as imputing unchastity<sup>6</sup>.

1 See PARA 56 ante.

2 See the Defamation Act 1951 s 2; and PARA 57 ante.

3 See the Slander of Women Act 1891 s 1. In any action for words spoken and made actionable by that Act, a plaintiff may not recover more costs than damages unless the judge certifies that there was reasonable ground for bringing the action: s 1 proviso.

4 *Kerr v Kennedy* [1942] 1 KB 409, [1942] 1 All ER 412; *Cuthbert v Linklater* 1935 SLT 94, where it was held (explaining *AB v Blackwood & Sons* (1902) 5 F 25, Ct of Sess) that an oral imputation of indelicacy of a gross kind against a woman is plainly actionable per se.

5 *Morrison v Ritchie & Co* (1902) 4 F 645, Ct of Sess.

6 As to the effect of changing social attitudes to sexual conduct on the law of defamation see PARA 52 ante.

## UPDATE

### 39-59 Defamatory Statements

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(3) DEFAMATORY STATEMENTS/(iii) Slander Actionable Per Se/59. Statement imputing contagious or infectious disease.

### **59. Statement imputing contagious or infectious disease.**

A statement that a person is suffering from a sexually-transmitted disease or that he suffers from the itch is defamatory<sup>1</sup> and actionable per se<sup>2</sup>. It may be defamatory to state that a person suffers from an infectious disease<sup>3</sup> but may not be defamatory to say that a person has suffered in the past from any such disease<sup>4</sup>.

1 *Bloodworth v Gray* (1844) 7 Man & G 334; and see PARA 53 ante.

2 *Villers v Monsley* (1769) 2 Wils 403. See also Bac Abr, Slander (B) 2: 'Man being formed for society it is highly reasonable that any words which import the charge of having a contagious distemper, should be in themselves actionable'. The only examples cited by Bacon are leprosy (*Taylor v Perks* (1607) Cro Jac 144) and venereal disease (*Milner v Reeves* (1617) 1 Roll Abr 43 pl 3; *Whitfield v Powel* (1698) 12 Mod Rep 248).

3 *Watkin v Hall* (1868) LR 3 QB 396 at 399 per Blackburn J. It will presumably depend upon the disease, eg it may not be defamatory to say that a person is suffering from influenza.

4 *Carslake v Mapledoram* (1788) 2 Term Rep 473, where it was said that *Austin v White* (1591) Cro Eliz 214, decided to the contrary, was not to be relied on, and the other cases relied on by the plaintiff (*Boxe's Case* (1582) Cro Eliz 2, cited in *Miller's Case* (1617) Cro Jac 430; and *Crittall v Horner* (1618) Hob 219) were explained as cases where special damage was alleged; see also *Taylor v Hall* (1742) 2 Stra 1189. Since the Slander of Women Act 1891 (see PARA 58 ante) it has been actionable per se to say that a woman has in time past suffered from a sexually-transmitted disease, if unchastity is imputed by it, and to that extent *Carslake v Mapledoram* supra is no longer law.

## **UPDATE**

### **39-59 Defamatory Statements**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/60. Need for publication.

## **(4) PUBLICATION**

### **(i) Publication of Libel**

#### **60. Need for publication.**

No action or prosecution for a libel will lie unless there has been a publication<sup>1</sup>. In a civil action for libel the plaintiff must allege<sup>2</sup> and prove that the defendant published, or caused to be published, 'of and concerning the plaintiff'<sup>3</sup>, the words complained of to a third person, namely to some person other than the plaintiff<sup>4</sup>. In criminal proceedings it is sufficient if the publication is to the person defamed<sup>5</sup>.

1 See *R v Burdett* (1820) 4 B & Ald 95, where the cases considered show that proof of publication was essential to the prosecutor's or plaintiff's case; see also *Lamb's Case* (1610) 9 Co Rep 59b; *Entick v Carrington* (1765) 19 State Tr 1029; *Edwards v Wooton* (1607) 12 Co Rep 35. In *R v Stockdale* (1789) 22 State Tr 237 at 300, Eyre CB, in delivering the opinion of the 12 judges, stated expressly that the crime consists in publishing a libel.

2 No technical form of words is required if the allegation may be collected from the statement of claim: *Baldwin v Elphinston* (1775) 2 Wm Bl 1037, Ex Ch, where a statement of claim alleging that the defendant printed a libel was held sufficient. To print a libel may be an innocent act; to have it printed involves delivery to a compositor or other subordinate workman, but printing in a newspaper admits of no doubt on the face of it: *Baldwin v Elphinston* supra at 1038. In *Watts v Fraser* (1837) 7 Ad & El 223 at 233, Lord Denman CJ said that it does not follow as of course, from a work being printed, that the party sending it forth employed a compositor, and declined to act on *Baldwin v Elphinston* supra. See also *R v Williams* (1811) 2 Camp 646; *R v Hunt* (1811) 2 Camp 583, where Lord Ellenborough CJ said that if an indictment charges that the defendant did and caused to be done a particular act, it is enough to prove either. The distinction runs through the whole criminal law. It is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime specified in it. As to pleading and practice in libel and slander actions see PARA 168 et seq post.

3 As to the words 'of and concerning the plaintiff' see *O'Brien v Clement* (1846) 16 M & W 159; and PARA 39 ante.

4 See PARAS 61-62 post.

5 See PARA 5 ante. In *R v Wegener* (1817) 2 Stark 245, the indictment for a libel sent to the prosecutor alone ought to have alleged an intent to provoke a breach of the peace and not an intent to injure the prosecutor in his profession, but in *R v Adams* (1888) 22 QBD 66, CCR, the court held that the indictment was good, as the libel 'under the circumstances might reasonably or probably tend to provoke a breach of the peace on her part or on the part of those connected with her', and that the court must be taken to have so found. See also *R v Brooke* (1856) 7 Cox CC 251. As to provoking a breach of the peace see also *R v Wicks* [1936] 1 All ER 384, CCA; and *Goldsmith v Pressdram Ltd* [1977] QB 83, [1977] 2 All ER 557.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/61. Publication to a third person.

## 61. Publication to a third person.

There is sufficient publication to a third person if there is publication to a stranger, or to the plaintiff's wife or husband<sup>1</sup>, or to the plaintiff's or defendant's employees<sup>2</sup>, or indeed to any person other than the plaintiff himself or the defendant's own wife or husband<sup>3</sup>.

1 See *Wenman v Ash* (1853) 13 CB 836; see also *Praed v Graham* (1889) 24 QBD 53, CA, where the plaintiff had recovered £500 damages for a libel on him published to his wife, and a new trial on the ground of excessive damages was refused.

2 See PARA 62 notes 5-6 post, where publication to the plaintiff's agent is also dealt with.

3 At common law husband and wife are one: see *Wennhak v Morgan* (1888) 20 QBD 635, DC.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/62. What amounts to publication.

## 62. What amounts to publication.

For the purposes of a civil action for libel, publication is the communication of defamatory matter to a third person<sup>1</sup>. However, for the purpose of criminal proceedings, publication to the person defamed is sufficient<sup>2</sup>. Merely to write down defamatory words is not to publish a libel<sup>3</sup>. Even to deliver a defamatory statement to another is not to publish it to him if he does not

become aware of the defamatory words<sup>4</sup>. Publication consists in making known the defamatory statement (in the case of libel, after it has been reduced to some permanent form). If the writer of a letter locks it up in his own desk, and a thief comes and breaks it open and takes away the letter and makes its contents known, that would not be a publication by the writer<sup>5</sup>.

Each communication of a libel is a separate publication in respect of which a civil action may be brought<sup>6</sup> or criminal proceedings may be instituted<sup>7</sup>. However, the court has power to stay actions which are vexatious and an abuse of the process of the court<sup>8</sup>.

Failure to erase or otherwise remove defamatory matter from a place where it may be seen by others may constitute evidence of publication, for instance failure on the part of the person responsible for a notice board to remove a lampoon from it<sup>9</sup>.

It would appear that an Internet access provider is liable for publication, although if he has no effective control over the maker of the statement he will have a statutory defence<sup>10</sup>.

1 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 529, CA, per Lopes LJ. As to who is a third person see PARA 61 ante.

2 *Edwards v Wooton* (1607) 12 Co Rep 35 (no action lies against one who sends a libel written in a sealed letter directed to the person libelled without any other publication, but such an offence is indictable); cf *R v Wegener* (1817) 2 Stark 245; *Phillips v Jansen* (1798) 2 Esp 623, where in an action for a libel in a private letter it was held that it must be proved to have been addressed to a third person, not to the plaintiff himself.

3 The writer knows what he has written, and if he wishes not to publish it must take care to keep it to himself: see *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 527, CA; and note 5 infra.

4 *Clutterbuck v Chaffers* (1816) 1 Stark 471.

5 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 527, CA, per Lord Esher MR, where it was held that there was publication both to the defendant's typist and office boy and to the plaintiff's clerks. See also *Boxsius v Goblet Frères* [1894] 1 QB 842, CA (publication to defendants' clerks). As to qualified privilege in such circumstances see PARA 118 post.

6 *Duke of Brunswick v Harmer* (1849) 14 QB 185, where the plaintiff's agent purchased a copy of a newspaper published 17 years previously; although the original publication was statute-barred, the publication to the agent was actionable. The question whether or not the publication to the agent was procured by the plaintiff was not before the court: *Duke of Brunswick v Harmer* supra at 189 per Coleridge J. As to publication induced by the plaintiff see PARA 166 post. See also *Smith v Wood* (1812) 3 Camp 323.

7 *R v Carlisle* (1819) 1 Chit 451 (sale of a back copy of a newspaper). As to the criminal liability of principals see the Libel Act 1843 s 7; and PARAS 69 text to note 2, 300 post.

8 *Jones v Pritchard* (1849) 6 Dow & L 529, where there were seven actions against the defendant by the plaintiff and six were stayed. See also *Macdougall v Knight* (1890) 25 QBD 1, CA, where a second action in respect of a different part of the same libellous document was stayed; *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 at 574, [1977] 1 WLR 478 at 489, CA, per Lord Denning MR.

9 *Byrne v Deane* [1937] 1 KB 818, [1937] 2 All ER 204, CA; *Heller v Bianco* 244 P 2d 757 (1952).

10 As to the statutory defence available see the Defamation Act 1996 s 1(3)(e); and PARA 158 head (3) post.

## UPDATE

### 62 What amounts to publication

NOTE 6--See *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2001] All ER (D) 44 (Dec) (publication on internet was not single publication).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/63. Incidental publication.

### 63. Incidental publication.

Although as a general rule the writer of a libel is not liable civilly if he addresses it to the plaintiff himself, yet if he addresses it to the plaintiff knowing or having reason to know that it is likely to be opened and read before it reaches the plaintiff's hands, for instance by a secretary or clerk, and it is so opened and read, there will be a publication for which the writer will be liable<sup>1</sup>, subject to a defence of qualified privilege if there is a sufficient common interest between plaintiff and defendant in the subject matter of the letter<sup>2</sup>.

Conversely, if a letter containing a libel intended for and addressed to the person libelled is wrongfully opened by a third person, there is no publication<sup>3</sup>. However, where the defendant wrote a letter defamatory of the plaintiff and put it through her letterbox and the letter was opened by her husband without looking at the name on the envelope, a finding that the letter was published to the husband was upheld<sup>4</sup>.

It seems that the mere dictation of defamatory matter to a clerk or typist is the publication of a slander only<sup>5</sup>, but if a person reads a defamatory document, knowing it to be defamatory, to any person other than the person defamed, it seems that there is publication of a libel<sup>6</sup>. If a person dictates defamatory matter to a clerk or typist and instructs the clerk or typist to copy or transcribe the dictation, and the clerk or typist does so, there is publication of a libel to the clerk or typist<sup>7</sup>.

1 *Gomersall v Davies* (1898) 14 TLR 430, CA; see also *Delacroix v Thevenot* (1817) 2 Stark 63. As to putting the word 'Private' on letters see *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 529, CA, where the letter was directed to the plaintiffs' firm instead of to the plaintiffs in their individual capacity and was opened by one of their clerks; the sender might have written 'Private' outside it in order to prevent it being opened by a clerk; the defendants placed the letter out of their own control and took no means to prevent its being opened by the plaintiffs' clerks. See also note 3 infra.

2 As to this 'ancillary' qualified privilege see PARA 118 post.

3 *Huth v Huth* [1915] 3 KB 32, CA; *Powell v Gelston* [1916] 2 KB 615; see also *Sharp v Skues* (1909) 25 TLR 336, CA.

4 *Theaker v Richardson* [1962] 1 All ER 229, [1962] 1 WLR 151, CA, where the court found as a question of fact that it was a natural and probable consequence that the plaintiff's husband would read the letter.

5 *Osborn v Thomas Boulter & Son* [1930] 2 KB 226 at 231, 236-237, CA. Publication to the clerk or typist will be privileged if done in the normal course of business: *Osborn v Thomas Boulter & Son* supra; see also *Bryanston Finance Ltd v de Vries* [1975] QB 703, [1975] 2 All ER 609, CA.

6 *Lamb's Case* (1610) 9 Co Rep 59b; *Forrester v Tyrrell* (1893) 57 JP 532, CA; *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662; *Robinson v Chambers (No 2)* [1946] NI 148; cf *Osborn v Thomas Boulter & Son* [1930] 2 KB 226, CA.

7 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, CA; *Boxsius v Goblet Frères* [1894] 1 QB 842, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/64. Negligent or accidental publication.

### 64. Negligent or accidental publication.

A person who knows or has reason to know that a document in his possession contains, or is likely to contain, a libel publishes it if, intending to post it to the person libelled, he by mistake



puts it in the wrong envelope and thus communicates it to a third person<sup>1</sup>. The defendant may also be liable if he negligently allows another person to read a defamatory document<sup>2</sup>.

1 See *Fox v Broderick* (1864) 14 ICLR 453. He is liable if, although he did not intend to communicate the libel to the plaintiff or to anyone else, he transmits it, instead of a different document, to a third person, and by his mistake communicates the libel to a third person. As to criminal prosecutions see *R v Paine* (1696) 5 Mod Rep 163, where P wrote the libel at another's dictation. He afterwards kept it in his study, and subsequently by mistake delivered it to B instead of another paper. B transmitted a copy of it to the Mayor of Bristol. P, later being examined by the mayor, confessed that he wrote the libel, but said that he neither composed nor published it, but only delivered it to B instead of another paper. However, P's employee proved that P sent him to the study for a writing and that as he did not bring the paper sent for, P fetched it himself, and being in the room only with Dr H the libel was repeated, but he could not tell by whom, but he remembered the first verse. The court said: 'It is true the delivering it by mistake is no publication, and if there was no other evidence against him but his own confession the whole must be taken and not so much of it as would serve to convict him. But when he sent his servant to his study for a paper but fetched another, it is not material whether it was read by Dr H or not; for if that was the libel and read by either, it is a publication'.

2 *Weld-Blundell v Stephens* [1920] AC 956, HL.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/65. Transmission by post or electronic means.

## **65. Transmission by post or electronic means.**

If a letter is sent through the post it is presumed, in the absence of other evidence, that the person to whom it is addressed received it in due course and that it was published to him<sup>1</sup>.

A person publishes a libel who transmits it to the plaintiff or anyone else through the post on a postcard<sup>2</sup> or by telegraph<sup>3</sup> which prima facie involves communication to third persons before the libel reaches the addressee's hands. A telex, facsimile (fax) or e-mail message is instantaneously passed from one machine to another and there is no intermediate communication of the message to any human being<sup>4</sup>. If a letter is placed in an unsealed envelope, in the absence of evidence that someone in the post office had in fact opened the envelope and read the letter, there is no presumption of publication of the letter<sup>5</sup>.

1 *Warren v Warren* (1834) 1 Cr M & R 250, where it was held that the production of a letter with the seal broken and with the postmark on it, is strong (per Parke B) or at least prima facie (per Alderson B) evidence that it was received by the addressee and of a publication to him. Where a letter containing a libel had itself the postmark on it, this was held prima facie evidence of it having been published: *Shipley v Todhunter* (1836) 7 C & P 680.

2 *Robinson v Jones* (1879) 4 LR Ir 391, where it was held to be an actionable publication, and that the privilege which might, in similar circumstances, have covered a sealed letter was no defence; *Sadgrove v Hole* [1901] 2 KB 1 at 4-5, CA, per AL Smith MR; *Huth v Huth* [1915] 3 KB 32 at 39, CA, per Lord Reading CJ.

3 In *Williamson v Freer* (1874) LR 9 CP 393 it was held that the unnecessary transmission of libellous matter by a telegram, which would have been privileged if sent in a sealed letter, avoided the privilege, it being assumed that a transmission by telegram involved publication to third persons before it reached the addressee. However, where transmission by telegram was the usual and reasonable course to adopt in the circumstances of the case, the privilege was not avoided: *Edmondson v Birch & Co Ltd and Horner* [1907] 1 KB 371, CA.

4 See eg *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327, [1955] 2 All ER 493, CA. In practice, however, a person other than the addressee may remove the message from the receiving machine.

5 *Huth v Huth* [1915] 3 KB 32, CA. See also PARA 63 ante.

## **UPDATE**

## 65 Transmission by post or electronic means

NOTE 1--Publication over the internet may be established where there is a reasonable inference of fact that the libellous matter has been read by a third party: *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EMLR 36. However, in the case of an alleged libel on the internet, there is no presumption of law that there has been a substantial publication within the jurisdiction: *Al Amoudi v Brisard* [2006] EWHC 1062 (QB), [2006] 3 All ER 294.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/66. Place of publication.

## 66. Place of publication.

Publication occurs at the place where the words are read or heard by the publishee<sup>1</sup>. If the defendant is within the jurisdiction<sup>2</sup> he may be sued for publication abroad if the publication is actionable according to English law and it is not justifiable by the law of the place where publication occurred<sup>3</sup>, or if it is actionable by that law<sup>4</sup>. In cases governed by the Brussels Convention, however, a publisher based in another European Union state may be sued in England and Wales only in respect of those copies actually distributed here<sup>5</sup>.

1 *Bata v Bata* [1948] WN 366, CA; *R v Burdett* (1820) 4 B & Ald 95.

2 If the defendant is outside the jurisdiction, and the Brussels Convention does not apply, application must be made for leave to serve the writ out of the jurisdiction, in which case, if the writ is founded on a tort, the tort must have been committed within the jurisdiction: RSC Ord 11 r 1(1)(f). Accordingly, where the libel is published abroad, the court will not have jurisdiction to allow service of the writ on the defendant out of the jurisdiction on that ground. As to the Brussels Convention (ie the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968)) see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 65 et seq.

3 *Phillips v Eyre* (1870) LR 6 QB 1 at 29, Ex Ch.

4 *Chaplin v Boys* [1971] AC 356 at 389, [1969] 2 All ER 1085 at 1102, HL, per Lord Wilberforce. See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 375. Note that defamation claims are expressly excluded from the Private International Law (Miscellaneous Provisions) Act 1995 by s 13(1); cf CONFLICT OF LAWS vol 8(3) (Reissue) PARA 377.

5 See Case C-68/93 *Shevill v Presse Alliance SA* [1995] 2 AC 18, [1995] ECR I-415, ECJ.

## UPDATE

## 66 Place of publication

NOTES--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

See *Berezovsky v Michaels*; *Glouchkov v Michaels* [2000] 2 All ER 986, HL (Russian plaintiff, with reputation in and connected to England, allowed to bring proceedings in England against American defendant). Cf *Chadha v Dow Jones and Co Inc* (1999) Times, 18 May, CA (parties based in United States; insufficient connection with United Kingdom; leave to serve writ out of jurisdiction refused).

NOTE 2--For a consideration of the appropriate forum in the case of an internet libel, see *King v Lewis* [2004] EWCA Civ 1329, (2004) Times, 26 October (material stored on website in California but published in United Kingdom).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/67. Liability for publication.

## **67. Liability for publication.**

Every person who publishes<sup>1</sup> or causes to be published or participates in a publication is liable as a publisher<sup>2</sup>.

<sup>1</sup> He makes known defamatory matter: see PARA 62 ante.

<sup>2</sup> See PARA 32 ante. As to the statutory defence for printers, distributors and other secondary publishers see, however paras 157-158 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/68. Responsibility of the writer of a libel for its publication.

## **68. Responsibility of the writer of a libel for its publication.**

Although writing is not in itself publication, the writer of a libel must be taken to understand what he has written, and he ought to do all he can to prevent it being made known to a third person<sup>1</sup>. Therefore, if a libel is published which is proved to be in the defendant's handwriting<sup>2</sup>, it is a question of fact whether the defendant caused it to be published, even if no direction to publish it is proved<sup>3</sup>.

<sup>1</sup> See *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 527, CA, per Lord Esher MR; and PARA 62 ante.

<sup>2</sup> To prove publication by the defendant, his manuscript found in the house of the editor of a newspaper in which the libel complained of appeared is admissible evidence, even if several parts have been erased and omitted in the newspaper, if the passages erased do not qualify the libel and the matter as published in the newspaper is still libellous: *Tarpley v Blabey* (1836) 2 Bing NC 437.

<sup>3</sup> *R v Lovett* (1839) 9 C & P 462; and see *Burdett v Abbot* (1811) 14 East 1; affd (1812) 4 Taunt 401, Ex Ch; on appeal (1817) 5 Dow 165 at 201, HL; *Bond v Douglas* (1836) 7 C & P 626. Where the plaintiff tendered secondary evidence to prove publication, and the defendant produced a document as the original, it was held that the judge was bound at that stage to hear evidence on both sides and to decide whether the document offered was the original, and that, if it was, secondary evidence was inadmissible: *Boyle v Wiseman* (1855) 11 Exch 360. Secondary evidence may be given when the defendant has destroyed a letter containing the libel: see *Rainy v Bravo* (1872) LR 4 PC 287. A duplicate of a printed paper containing a libel may be given in evidence where the original printed copy has been destroyed or cannot be identified: see *Fryer v Gathercole* (1849) 4 Exch 262; *Johnson v Hudson* (1836) 1 Har & W 680. As to proof of handwriting see *Brookes v Tichborne* (1850) 5 Exch 929; and CIVIL PROCEDURE vol 11 (2009) PARAS 832-834, 864.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/69. Newspaper proprietors and editors.

## **69. Newspaper proprietors and editors.**

A newspaper proprietor is answerable civilly<sup>1</sup> for his employee's or agent's acts in conducting the paper, even though he has in fact nothing to do with the publication, and the whole is conducted by his employees or agents. In the case of a criminal libel, a newspaper proprietor will be liable unless he proves by way of defence that the publication was made without his authority, consent or knowledge, and that the publication did not arise from want of due care or caution on his part<sup>2</sup>.

1 *R v Walter* (1799) 3 Esp 21. As to the statutory defence for printers, distributors and other secondary publishers see, however paras 157-158 post.

2 See the Libel Act 1843 s 7. In some cases the mere appointment of an editor without supervision or control may involve an authority to publish libels, as if the paper was a calumnious paper, but merely giving a general authority to an editor to conduct a paper is not per se evidence that the proprietor authorised or consented to the publication of a libel within the meaning of s 7: see *R v Holbrook* (1877) 3 QBD 60; *R v Holbrook* (1878) 4 QBD 42 at 50-51, 60-61, DC; *R v Allison* (1888) 16 Cox CC 559, CCR; *R v Love* (1955) 39 Cr App Rep 30, CCA. As to charges against persons responsible for the publication of a newspaper see further PARAS 293-295 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/70. Printers.

## **70. Printers.**

A printer who distributes a libel printed by him is liable as the publisher of it and, if a printer and an editor are sued for a libellous article contained in a magazine, they are both liable for a libellous illustration contained in it, even if it was not printed by the printer, provided that the illustration is referred to in the letterpress part of the libellous article<sup>1</sup>.

Even though a libel printed by a printer is not circulated, the printer is liable as the publisher for the publication to his compositors and other employees<sup>2</sup>; but a printer who is not also the author, editor or commercial publisher of the work may be protected by the statutory defence of reasonable care<sup>3</sup>.

1 *Watts v Fraser* (1835) 7 C & P 369.

2 See *Baldwin v Elphinston* (1775) 2 Wm Bl 1037, Ex Ch, criticised in *Watts v Fraser* (1837) 7 Ad & El 223 at 233; and see PARA 60 note 2 ante.

3 See the Defamation Act 1996 s 1; and PARAS 157-158 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/71. Publication by employee or agent in the course of employment.

## **71. Publication by employee or agent in the course of employment.**

An employer or principal is civilly liable for the act of publication by his employee if done in the course of his employment and within the scope of his authority or employment, even where he has had no actual authority to write or publish a libel<sup>1</sup>. If the employee or agent so acting writes and publishes statements defamatory of the plaintiff which he knows to be untrue he will be held to be malicious and the employer or principal will be vicariously liable for that malice<sup>2</sup>. This doctrine is as applicable to incorporated companies as to individuals<sup>3</sup>.

1 *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423 at 427-428, PC: 'if the act is done in the course of employment which is authorised, then the employer is liable'; and see *Glasgow Corpn v Lorimer* [1911] AC 209, HL; *Ormiston v Great Western Rly Co* [1917] 1 KB 598; and AGENCY vol 1 (2008) PARA 151. See also *Harding v Greening* (1817) 8 Taunt 42 (libel in daughter's handwriting; no evidence of publication by father).

2 See PARAS 155-156 post.

3 See note 1 supra; and COMPANIES vol 14 (2009) PARA 296. A limited company is liable for slander uttered by its employee in the course of his employment: *Finburgh v Moss' Empires Ltd* 1908 SC 928, following *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423, PC; *M'Adam v City and Suburban Dairies Ltd* 1911 SC 430; *Aiken v Caledonian Rly Co* 1913 SC 66; *Mandelston v North British Rly Co* 1917 SC 442. See also *Glasgow Corpn v Lorimer* [1911] AC 209 at 214, HL, where it was held that the averments disclosed no ground of action against the corporation. As to the liability of corporations and companies for libel see PARAS 25 ante, 289 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/72. Republication.

## 72. Republication.

The liability of the original publisher of a defamatory statement for its republication by the person to whom he published it is determined in accordance with the ordinary principles of causation and novus actus interveniens. There are no specific or special rules peculiar to defamation<sup>1</sup>. Prima facie, however, the unauthorised repetition of a libel will be treated as a novus actus interveniens, not as a natural and probable consequence of the original publication<sup>2</sup>.

1 See *Slipper v British Broadcasting Corpn* [1991] 1 QB 283, [1991] 1 All ER 165, CA (a case concerning causation of damage rather than liability for publication, but the principles stated are of similar application to both).

2 *Weld-Blundell v Stephens* [1920] AC 956, HL, approving *Ward v Weeks* (1830) 7 Bing 211, where there was repetition of a slander; but see *Slipper v British Broadcasting Corpn* [1991] 1 QB 283, [1991] 1 All ER 165, CA, distinguishing and explaining these authorities.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/73. Liability of original publisher on republication.

## 73. Liability of original publisher on republication.

Examples of situations in which the original publisher has been held liable for the repetition of his words include the following:

- 19 (1) the defendant is liable as the publisher of a libel if he requests, procures or authorises the publication to a third person<sup>1</sup>;
- 20 (2) if a defendant requests another to publish defamatory matter, and gives him a written statement of it for that purpose, whether in full or in outline, and the agent publishes that matter adhering to the sense and substance of it, although the language is to some extent his own, the defendant is liable as the publisher<sup>2</sup>;
- 21 (3) where the defendant at a meeting at which a newspaper reporter is present speaks words defamatory of the plaintiff and requests that the press give publicity to his words, he will be liable for the publication in the newspaper<sup>3</sup>;

- 22 (4) if the defendant orally communicates to a newspaper reporter words defamatory of the plaintiff for the purpose of having his words published in the newspaper, he will be liable for their publication in the newspaper<sup>4</sup>; a defendant will not, however, always be liable for the publication in a newspaper of his answers to a reporter's questions<sup>5</sup>.

The test is whether or not the defendant authorised the repetition in a written form or it can be inferred from the surrounding circumstances that he anticipated and wished his words to be repeated in that form<sup>6</sup>. Such an inference will usually, but not always, be the proper one.

1 *Speight v Gosnay* (1891) 60 LJQB 231, CA; considered in *Slipper v British Broadcasting Corp* [1991] 1 QB 283, [1991] 1 All ER 165, CA.

2 *Parkes v Prescott* (1869) LR 4 Exch 169 at 178 per Montague Smith J. See also *R v Hall* (1721) 1 Stra 416; *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474; and PARAS 72 ante, 81 post.

3 *Parkes v Prescott* (1869) LR 4 Exch 169 (request to reporter to give publicity to speech).

4 *Adams v Kelly* (1824) Ry & M 157; *R v Cooper* (1846) 8 QB 533.

5 *Nutbrown v Lawson* (4 May 1978, unreported), QB, decision of Park J. Cf *Hay v Smithers* (1911) Times, 19 January, where the court found as a question of fact that the defendant authorised the publication.

6 *Weld-Blundell v Stephens* [1920] AC 956 at 999, HL, per Lord Wrenbury; *Nutbrown v Lawson* (4 May 1978, unreported), QB. Cf *Ward v Weeks* (1830) 7 Bing 211; see also *Whitney v Moignard* (1890) 24 QBD 630.

## UPDATE

### 73 Liability of original publisher on republication

NOTE 6--If a defendant is aware that her words or actions will be reported and, therefore, that if she were to slander someone, that slander will be repeated, it is fair and just for her to be held responsible for the resulting damage: *McManus v Beckham* [2002] EWCA Civ 939, [2002] 4 All ER 497.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/74. Publication at another's request.

### 74. Publication at another's request.

The person who publishes a libel cannot avoid liability for publication by showing that he did so at the request or by the order of another person. Thus, it is no answer to a libel action that the defendant had the libellous statement from another and on publication disclosed the author's name<sup>1</sup>, even if he believed the statement to be true<sup>2</sup> unless the case falls within one of the recognised heads of privilege<sup>3</sup>. The defendant may, however, prove these matters in mitigation of damages<sup>4</sup>.

1 *De Crespigny v Wellesley* (1829) 5 Bing 392. It is no answer for the defendant to show that he named his informant and believed the tale to be true: see *M'Pherson v Daniels* (1829) 10 B & C 263; *Ward v Weeks* (1830) 7 Bing 211; *Watkin v Hall* (1868) LR 3 QB 396 at 400-401, 403. See also the other cases cited in the note of Sir Edward Vaughan Williams to *Craft v Boite* (1669) 1 Wms Saund (1871 Edn) 310 at 330. As to the joint publication of libel see PARA 38 ante. As to the liability of the original utterer of a slander which has been repeated see PARA 81 post.

2 *Tidman v Ainslie* (1854) 10 Exch 63; *Botterill v Whytehead* (1879) 41 LT 588; and see note 1 supra. If the occasion is privileged, the defendants' belief in the truth of the statement is material on the issue of actual malice: see PARA 153 post.

3 As to privilege see PARA 94 et seq post.

4 See PARA 263 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/75. Publication by defendant's spouse.

## **75. Publication by defendant's spouse.**

The defendant's wife or husband<sup>1</sup> may be the defendant's agent in publishing a libel to a third person so as to make the defendant a publisher of it.

1 In *Trumbull v Gibbons* (1816) (an American case, 3 City Hall Recorder 97, cited from Odgers on Libel and Slander (6th Edn) 133), and *Wennhak v Morgan* (1888) 20 QBD 635 at 637, DC, the delivery of certain pamphlets by the defendant to his wife was held not to be a publication to her, but her delivery of the pamphlets to third persons was held to be a publication by the defendant, as in delivering them the wife acted as the defendant's agent.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/76. Publication by broadcasting and telecommunication systems.

## **76. Publication by broadcasting and telecommunication systems.**

For the purposes of the law of libel and slander, including the law of criminal libel so far as it relates to the publication of defamatory matter, the publication of words in the course of any programme<sup>1</sup> included in a programme service is to be treated as publication in permanent form<sup>2</sup>. 'Programme service' means any of the following services, whether or not it is, or it requires to be, licensed under the Broadcasting Act 1990:

- 23 (1) any television broadcasting service<sup>3</sup> or other television programme service<sup>4</sup>;
- 24 (2) any sound broadcasting service<sup>5</sup> or licensable sound programme service<sup>6</sup>;
- 25 (3) any other service which consists in the sending, by means of a telecommunication system, of sounds or visual images or both either for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service) or for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons<sup>7</sup>.

1 'Programme' includes an advertisement and, in relation to any service, includes any item included in that service: Broadcasting Act 1990 s 202(1).

2 Ibid s 166(1). This provision applies for the purposes of the Defamation Act 1952 s 3 (slander of title etc: see PARAS 276, 285 post) as it applies for the purposes of the law of libel and slander: Broadcasting Act 1990 s 166(2), (4).

3 For these purposes, 'television broadcasting service' means a service consisting in the broadcasting of television programmes for general reception in, or in any area in, the United Kingdom, including a domestic

satellite service as defined by *ibid* s 43(1), but does not include any teletext service or any other service in the case of which the visual images broadcast in the service consist wholly or mainly of non-representational images, ie visual images which are neither still pictures nor comprised within sequences of visual images capable of being seen as moving pictures: ss 2(5), (6), 202(1)(a). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom.

4 'Television programme service' means (1) a television broadcasting service as defined by the Broadcasting Act 1990 s 2(5) (see note 3 *supra*); (2) a non-domestic satellite service as defined by s 43(2); or (3) a licensable programme service as defined by s 46(1): ss 2(4), 201(1)(a). See further TELECOMMUNICATIONS AND BROADCASTING.

5 For these purposes, 'sound broadcasting service' means a broadcasting service whose broadcasts consist of transmissions in sound only: *ibid* ss 126(1), 201(1)(b).

6 For these purposes, 'licensable sound programme service' means a service consisting in the provision by any person of sound programmes with a view to their being conveyed, by means of a telecommunication system, for reception in two or more dwelling houses in the United Kingdom, and otherwise than for the purpose of being received there by persons who have a business interest in receiving them, whether the telecommunication system is run by the person so providing the programmes or by some other person, and whether the programmes are to be so conveyed for simultaneous reception or for reception at different times in response to requests made by different users of the service; but does not include a service where the programmes are provided for transmission in the course of the provision of a sound broadcasting service, a service where the running of the telecommunication system does not require to be licensed under the Telecommunications Act 1984 Pt II (ss 5-46A) (as amended), or a two-way service as defined by the Broadcasting Act 1990 s 46(2)(c): Broadcasting Act 1990 ss 112(1), (2), 126(1), 201(1)(b). 'Telecommunication system' means a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of (1) speech, music and other sounds; (2) visual images; (3) signals serving for the impartation, whether as between persons and persons, things and things or persons and things, of any matter otherwise than in the form of sounds or visual images; or (4) signals serving for the actuation or control of machinery or apparatus: Telecommunications Act 1984 s 4(1), applied by the Broadcasting Act 1990 s 202(1).

7 *Ibid* s 201(1). Head (3) in the text does not apply to (1) a local delivery service within the meaning of Pt II (ss 72-82); (2) a service where the running of the telecommunication system does not require to be licensed under the Telecommunications Act 1984 Pt II (as amended); or (3) a two-way service as defined by the Broadcasting Act 1990 s 46(2)(c): Broadcasting Act 1990 s 201(2). See further TELECOMMUNICATIONS AND BROADCASTING.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/77. Publication in theatres.

## 77. Publication in theatres.

Publication of words<sup>1</sup> in a play is to be treated as publication in permanent form, namely, libel<sup>2</sup>. However, this provision does not apply where the performance of a play is given on a domestic occasion in a private dwelling<sup>3</sup> or is given solely or primarily for the purpose of a rehearsal<sup>4</sup> or to enable (1) a record<sup>5</sup> or cinematograph film<sup>6</sup> to be made from or by means of the performance<sup>7</sup>; (2) the performance to be broadcast<sup>8</sup>; or (3) the performance to be included in a programme service<sup>9</sup> other than a sound or television broadcasting service<sup>10</sup>.

1 For the meaning of 'words' see PARA 11 note 1 *ante*.

2 See the Theatres Act 1968 s 4(1); and PARA 11 *ante*.

3 *Ibid* s 7(1).

4 *Ibid* s 7(2)(a).

5 'Record' means any record or similar contrivance for reproducing sound, including the soundtrack of a cinematograph film (defined in note 6 *infra*): *ibid* s 7(3).



6 'Cinematograph film' means any print, negative, tape or other article on which a performance of a play or any part of such a performance is recorded for the purposes of visual reproduction: *ibid* s 7(3).

7 *Ibid* s 7(2)(b)(i).

8 *Ibid* s 7(2)(b)(ii). 'Broadcast' means broadcast by wireless telegraphy within the meaning of the Wireless Telegraphy Act 1949 (see s 19(1) (as amended); and TELECOMMUNICATIONS AND BROADCASTING), whether by way of sound broadcasting or television: Theatres Act 1968 s 7(3).

9 Is a programme service within the meaning of the Broadcasting Act 1990: see PARA 76 ante): Theatres Act 1968 s 7(2)(b)(iii) (substituted by the Broadcasting Act 1990 s 203(1), Sch 20 para 13).

10 Theatres Act 1968 s 7(2)(b)(iii) (as substituted: see note 9 *supra*).

## UPDATE

### 77 Publication in theatres

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--Reference to Wireless Telegraphy Act 1949 now to Wireless Telegraphy Act 2006: Theatres Act 1968 s 7(3) (amended by the 2006 Act Sch 7 para 3). For the meaning of 'wireless telegraphy' see s 116.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(i) Publication of Libel/78. Issues of publication and privilege.

### 78. Issues of publication and privilege.

The question of privilege must be kept distinct from the question of publication. Privilege in no sense negatives publication; it excuses it<sup>1</sup>.

1 See *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, CA; *Boxsius v Goblet Frères* [1894] 1 QB 842, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(ii) Publication of Slander/79. What is publication of slander.

### (ii) Publication of Slander

#### 79. What is publication of slander.

A person publishes a slander who speaks words defamatory of the plaintiff to or in the presence of a third person who hears them. Where the words are broadcast<sup>1</sup>, or spoken in a theatre<sup>2</sup>, or recorded in permanent form and retransmitted<sup>3</sup>, the publication is treated as libel. The mere dictation of defamatory matter to a clerk or typist is the publication of a slander although when, as is usual, the clerk reduces it to permanent form and reads it, a libel is also published to him<sup>4</sup>. However, where a person reads a defamatory document aloud, knowing it to be defamatory, to any person other than the person defamed, it is probable that slander rather than libel is committed<sup>5</sup>.

1 See PARA 76 ante.

2 See PARA 77 ante.

3 See PARA 11 ante.

4 *Osborn v Thomas Boulter & Son* [1930] 2 KB 226, CA; *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 324, CA; and see PARA 63 ante.

5 See PARA 63 note 6 ante.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(ii) Publication of Slander/80. Publication by repetition.

### **80. Publication by repetition.**

If in publishing a slander a person is merely repeating what he has heard, there is nevertheless a publication by him of that which he makes known to the third person<sup>1</sup>; but a person who merely repeats a slander may prove in mitigation of damages that he disclosed the name of his informant at the time of repetition<sup>2</sup>.

1 See *McPherson v Daniels* (1829) 10 B & C 263; and PARA 62 ante.

2 See PARA 263 post. Cf *McPherson v Daniels* (1829) 10 B & C 263 at 273 per Little Dale J ('the person who repeats it gives greater weight to the slander') and at 276 per Parke J.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/1. THE CAUSES OF ACTION/(4) PUBLICATION/(ii) Publication of Slander/81. Responsibility for repetition.

### **81. Responsibility for repetition.**

Liability of the original slanderer for the repetition of his words by others is determined on similar principles to those applicable in libel<sup>1</sup>. The older authorities, which suggested that different principles might apply, now seem unlikely to be followed<sup>2</sup>.

1 As to these principles see PARAS 72-73 ante.

2 See *Slipper v British Broadcasting Corp'n* [1991] 1 QB 283, [1991] 1 All ER 165, CA, in which the authorities are reviewed as instances of the law of defamation generally, without any emphasis on the distinction between libel and slander.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/82. Truth as a defence.

## **2. DEFENCES**

### **(1) JUSTIFICATION**

## 82. Truth as a defence.

The defence of justification is that the words complained of were true in substance and in fact<sup>1</sup>.

Since the law presumes that every person is of good repute until the contrary is proved, it is for the defendant to plead and prove affirmatively<sup>2</sup> that the defamatory words are true or substantially true<sup>3</sup>. If a defendant pleads justification, where the words complained of consist of statements of fact and comment, he must prove that the defamatory statements of fact are true or substantially true and that the defamatory inferences borne by the comment are true<sup>4</sup>. Truth may be pleaded as a defence to the whole of the defamatory statements or in the alternative as a defence to a severable part of them<sup>5</sup>.

Failure to establish the defence at trial may properly be taken into account in aggravation of damages<sup>6</sup>.

The defence may be pleaded in the alternative to a defence which denies publication<sup>7</sup>.

1 Justification is a defence because the law will not permit a person to recover damages in respect of an injury to a character which he either does not, or ought not, to possess: *McPherson v Daniel* (1829) 10 B & C 263 at 272 per Littleton J. By contrast a notice of mitigation only concerns a person's actual reputation: see PARA 260 post.

2 A defence which traverses the allegation that the defendant falsely and maliciously published the words complained of without pleading justification may be ordered to be struck out: *Belt v Lawes* (1882) 51 LJQB 359, DC. As to discovery and interrogatories see PARA 210 et seq post; and CIVIL PROCEDURE.

3 See the Defamation Act 1952 s 5; and PARA 86 post. Section 5 must be pleaded specifically: see *Moore v News of the World Ltd* [1972] 1 QB 441, [1972] 1 All ER 915, CA; and CIVIL PROCEDURE.

4 *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 at 535, [1965] 1 WLR 805 at 817, CA; *Truth (NZ) Ltd v Avery* [1959] NZLR 274. The 'rolled-up plea' is a plea of fair comment only; the averment that the facts are true merely lays the necessary basis for the defence of fair comment, and is quite different from the plea of justification, under which the defendant must prove the truth both of the facts and of any comments upon them: see *Sutherland v Stopes* [1925] AC 47 at 62-63, HL, per Viscount Finlay. See also PARAS 88, 135, 148, 192 post.

5 As to severance see PARA 87 post.

6 *Associated Leisure (Phonographic Equipment Co Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450 at 456, [1970] 2 All ER 754 at 757, CA; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071, [1972] 1 All ER 801 at 824, HL.

7 As to pleading the defence of justification see generally the Supreme Court Practice 1997 para 18/12/8.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/83. Defence of justification; the words to be justified.

## 83. Defence of justification; the words to be justified.

The defence of justification asserts that the sting of the defamatory statement in its proper context is true in substance and in fact<sup>1</sup>. Where a plaintiff complains of words in part of a publication the defendant may refer to the whole publication in order to aver that in their context the words bore a meaning different from that alleged by the plaintiff and that in that meaning they are true<sup>2</sup>. The defendant may not otherwise assert a version of the words which differs materially from the plaintiff's version and justify that version<sup>3</sup>.

1 *Edwards v Bell* (1824) 1 Bing 403 at 409.

2 *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000, [1986] 2 All ER 84, CA. As to reading material in context see *S and K Holdings Ltd v Throgmorton Publications Ltd* [1972] 3 All ER 497, [1972] 1 WLR 1036, CA; *Plato Films Ltd v Speidel* [1961] AC 1090 at 1143-1144, [1961] 1 All ER 876 at 892, HL, per Lord Denning.

3 *Rassam v Budge* [1893] 1 QB 571 at 574, CA. As to the meanings of the words which may be justified and as to severable statements see PARAS 84, 87 post.

## UPDATE

### 83 Defence of justification; the words to be justified

NOTE 1--See *Sarwar v News Group Newspapers Ltd* 1999 SLT 327, Outer House (the defendant's assertions to prove that the sting of the article was true were sufficient for that purpose).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/84. Defence of justification; meanings which may be justified.

### 84. Defence of justification; meanings which may be justified.

The defendant may seek to justify the words complained of in their proper context in any meaning which they are reasonably capable of bearing, whether or not that meaning is alleged by the plaintiff<sup>1</sup>. He may also justify the words complained of in their natural and ordinary meaning or any innuendo meaning that has been pleaded, whether it is a natural and ordinary meaning or an innuendo meaning.

If the plaintiff has pleaded a meaning wider than was necessary, he will enable the defendant to justify that wider meaning and to include in his particulars matters which he might not otherwise have been entitled to plead<sup>2</sup>.

Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification. If the several allegations have a common sting, they are not to be treated as separate and distinct and the defendant may justify any of them<sup>3</sup>.

A defendant is not entitled to defend a specific defamatory charge of wrongdoing by seeking to justify such wrongdoing generally unless the words bear that wider general meaning<sup>4</sup>.

1 *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413, [1959] 1 All ER 453, CA; *Waters v Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758, [1961] 1 WLR 967, CA; *London Computer Operators Training Ltd v British Broadcasting Corp* [1973] 2 All ER 170, [1973] 1 WLR 424, CA; *Williams v Reason* [1988] 1 All ER 262, [1988] 1 WLR 96n, CA; *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000, [1986] 2 All ER 84, CA. However a defendant is not entitled to plead facts which are not sufficient to justify the words in any meaning they might bear for the purpose of mitigating damage. Only if a plea of justification is directed to a possible sting of the libel can the evidence adduced in support of the plea go to reduce damages even though the plea fails: *Prager v Times Newspapers Ltd* [1988] 1 All ER 300, [1988] 1 WLR 77, CA; see also *Atkinson v Fitzwalter* [1987] 1 All ER 483, [1987] 1 WLR 201, CA.

2 *Maisel v Financial Times Ltd* (1915) 84 LJB 2145, HL; *MacGrath v Black* (1926) 95 LJB 951, CA.

3 *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000, [1986] 2 All ER 84, CA. As to the defendant's obligation to plead the meanings he seeks to justify see PARA 189 post.

4 *Bookbinder v Tebbit* [1989] 1 All ER 1169, [1989] 1 WLR 640, CA. If the words are capable of bearing the wider meaning, a defence of justification to that meaning would be left to the jury.

## UPDATE

### 84 Defence of justification; meanings which may be justified

NOTE 3--See also *Cruise v Express Newspapers plc* [1999] 2 WLR 327, CA (where an article contains two separate and distinct stings, but the plaintiff only complains of one of them, the defendant cannot assert the truth of the other sting in order to justify the article).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/85. Substantial justification of a single charge.

### 85. Substantial justification of a single charge.

A justification of the sting of a libel may be sufficient even if it does not extend to every epithet or detail in the words complained of<sup>1</sup>.

<sup>1</sup> *Edwards v Bell* (1824) 1 Bing 403 at 409. See also *Morrison v Harmer* (1837) 3 Bing NC 759 at 767; and PARA 91 notes 2, 4 post. See also PARA 86 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/86. Justification of distinct charges.

### 86. Justification of distinct charges.

If an action for libel or slander is brought in respect of words<sup>1</sup> containing two or more distinct charges<sup>2</sup> against the plaintiff, a defence of justification does not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges<sup>3</sup>. This defence must be specifically pleaded<sup>4</sup>. The defence requires the distinct charges to be founded on separate words, and these must be contained in the passages of which the plaintiff complains<sup>5</sup>.

<sup>1</sup> For the meaning of 'words' see PARA 11 note 1 ante.

<sup>2</sup> As to where charges are severable see PARA 87 post.

<sup>3</sup> Defamation Act 1952 s 5. Section 5 only applies where the words complained of contain more than one charge against the plaintiff. As to the substantial justification of a single charge see PARA 85 ante.

<sup>4</sup> *Moore v News of the World Ltd* [1972] 1 QB 441, [1972] 1 All ER 915, CA.

<sup>5</sup> *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000, [1986] 2 All ER 84, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/87. Severable charges.

### 87. Severable charges.

The defendant may justify<sup>1</sup> part of the words complained of, but only if the part justified is severable from the remainder<sup>2</sup>. Where the charge complained of is not severable, the defendant must justify substantially its full extent<sup>3</sup>. Thus, to a plaintiff who complained of defamatory words imputing that he had committed murder it would be no defence to plead that the plaintiff had committed manslaughter<sup>4</sup>.

1 As to the defence of justification generally see PARA 84 ante.

2 *S and K Holdings Ltd v Throgmorton Publications Ltd* [1972] 3 All ER 497, [1972] 1 WLR 1036, CA; see also *Rassam v Budge* [1893] 1 QB 571 at 576, CA; *Goody v Odhams Press Ltd* [1967] 1 QB 333, [1966] 3 All ER 369, CA (where this was called a partial justification: see at 340 and 372 per Lord Denning MR). Where the defendant published that the plaintiff, a proctor, had been suspended three times, so that his neighbours were led to think he had been guilty of extortion, a plea that he had been suspended once for extortion was held bad: *Clarkson v Lawson* (1829) 6 Bing 266, distinguishing *Edwards v Bell* (1824) 1 Bing 403. Subsequently, the defendant put in a plea to one of the suspensions that the plaintiff had been once suspended by Sir J Nicholl, and it was held that the libellous matter was thus divisible and the plea an answer as to part: *Clarkson v Lawson* (1830) 6 Bing 587. See also *Clarke v Taylor* (1836) 2 Bing NC 654; cf *Roberts v Brown* (1834) 10 Bing 519; and see *Edsall v Russell* (1842) 4 Man & G 1090; *Botterill v Whytehead* (1879) 41 LT 588. See also PARA 190 text and note 10 post. As to justification of part of the statement not complained of by the plaintiff see PARA 84 ante.

3 As to substantial justification see PARA 85 ante.

4 *Clarkson v Lawson* (1830) 6 Bing 587 at 593; *Helsham v Blackwood* (1851) 11 CB 111 (a charge of killing an antagonist in a duel in circumstances revolting to a man of honour was not justified by a defence alleging simply killing in a duel; nor was a charge of quitting a town in circumstances showing an intent to defraud creditors sufficiently answered by a defence of quitting in circumstances consistent with an absence of intent to defraud). See also *O'Brien v Bryant* (1846) 16 M & W 168; *Biggs v Great Eastern Rly Co* (1868) 18 LT 482.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/88. Justifying comment.

### 88. Justifying comment.

Where a defendant seeks to justify a comment that he has made, he must prove the facts and the inferences from both fact and comment to be true<sup>1</sup>.

1 *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 at 535, [1965] 1 WLR 805 at 817, CA, per Sellers LJ; *Sutherland v Stopes* [1925] AC 47 at 62-63, HL; see also PARAS 82 text and note 4 ante, 148 post. As to where both justification and fair comment are pleaded see PARA 135 note 7 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/89. Effect of apology.

### 89. Effect of apology.

The defendant in an action for libel is not barred from pleading justification by having on a former occasion written a letter of apology admitting that similar statements then made by him were false and undertaking not to repeat them, although he may have no defence to an action for breach of the undertaking<sup>1</sup>.

1 *R v S* 1914 SC 193. The breach of an undertaking if given to the court may also constitute a contempt of court: see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 482.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/90. Rumours and reports.

## 90. Rumours and reports.

If the defendant made a statement, whether written or oral, which is defamatory of the plaintiff, it is no justification that the statement purported to be made on the relation of another, and that it had, in fact, been related to the defendant by that other, even if the defendant disclosed the name of his informant at the time or subsequently at the earliest opportunity<sup>1</sup>. For the purpose of the law of defamation, a hearsay statement is the same as a direct statement. Every republication of a libel is a new libel and each publisher is answerable as if it originated with him<sup>2</sup>. This is generally known as the repetition rule. Nevertheless, the context in which the words were repeated must be taken into account when determining the meaning of the words complained of<sup>3</sup>. It seems that in certain circumstances a rumour may be repeated without suggesting that it is well founded and that proof only of the fact of the rumour may be sufficient justification<sup>4</sup>. A statement that a writ or equivalent civil proceeding has been issued may convey no more than the fact that the relevant proceedings have been commenced<sup>5</sup>.

1 *McPherson v Daniels* (1829) 10 B & C 263; *Truth (NZ) Ltd v Holloway* [1960] 1 WLR 997; *Stern v Piper* [1997] QB 123, [1996] 3 All ER 385, CA; and see *Hennessy v Wright* (1888) 57 LQB 594, CA; *Cookson v Harewood* [1932] 2 KB 478n at 485n, CA.

2 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 283-284, sub nom *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 173, HL, per Lord Devlin.

3 *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43 at 49, NSW CA. See also *Stubbs Ltd v Mazure* [1920] AC 66, HL, where the words were held defamatory, notwithstanding a prefatory note; *Savage v News Ltd* [1932] SASR 240 (Aust), where a newspaper article published a libel purportedly (but not in fact) contained in a book, but included a denial, and it was held to be defamatory; and Duncan and Neill on Defamation (2nd Edn, 1983) PARA 11.16.

4 *Aspro Travel Ltd v Owners Abroad Group plc* [1995] 4 All ER 728, [1996] 1 WLR 132, CA. See, however, *Stern v Piper* [1997] QB 123, [1996] 3 All ER 385, CA, in which *Aspro Travel Ltd v Owners Abroad Group plc* supra was not cited.

5 Ie this is a possible meaning which should be left to the jury: *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413, [1959] 1 All ER 453, CA. See also *Waters v Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758, [1961] 1 WLR 967, CA. This is, however, a special category: *Stern v Piper* [1997] QB 123, [1996] 3 All ER 385, CA.

## UPDATE

### 90 Rumours and reports

TEXT AND NOTE 4--The view taken in *Aspro Travel Ltd v Owners Abroad Group plc* has been disapproved, and *Stern v Piper* preferred in *Shah v Standard Chartered Bank* [1998] 4 All ER 155, [1998] 3 WLR 592, CA. See also *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772, [2002] EMLR 839 (repetition rule meant that report of defamatory allegation bore same meaning as original allegation).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/91. Proof of justification.

## 91. Proof of justification.

The law presumes that defamatory words are false, and it is for the defendant to satisfy the court that the statement which is justified is true in substance and in fact<sup>1</sup>.

If the statement complained of imputes the commission by the plaintiff of a criminal offence, to succeed in his plea of justification the defendant must prove the commission of the offence charged, but it seems that, as for any civil action, the standard of proof is proof on a balance of probabilities, although the more serious the charge the higher the degree of probability required<sup>2</sup>. If at the time that the issue of justification is determined the plaintiff stands convicted of the offence, the conviction is conclusive evidence that he committed that offence and is admissible accordingly; but if an issue arises as to whether any person other than the plaintiff has committed a criminal offence, the conviction is not conclusive evidence of the offence<sup>3</sup>. In cases not imputing the commission of a criminal offence the proof required is, perhaps, less strict, but the defendant must satisfy the court that the statement justified is substantially true, even if the proof does not establish every detail<sup>4</sup>.

If the statement complained of is that the plaintiff has been guilty of habitual misconduct, the defendant does not discharge the burden on him by proving one isolated instance of such misconduct<sup>5</sup>. Furthermore, the reference in the words complained of to a past conviction or past misconduct may in the context of the publication suggest that the plaintiff has still, at the time of the publication, a propensity for such misconduct and is, therefore, not to be trusted; and a plea of justification based on such a past offence or misconduct will not, in those circumstances, be a sufficient justification<sup>6</sup>. A statement that a person is suspected of an offence does not necessarily imply actual guilt and will not necessarily have to be justified by proof of actual guilt<sup>7</sup>.

If the plaintiff does not apply for particulars of the justification, the defendant may give any evidence at the trial relevant to his plea of justification<sup>8</sup>.

1 As to substantial justification see PARA 85 ante.

2 See *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 258, [1956] 3 All ER 970 at 973, CA, per Lord Denning MR: 'the more serious the allegation the higher the degree of probability that is required, but it need not in a civil case reach the very high standard required by the criminal law' (allegation of fraud in a civil action). See also *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR 451; *Hinds v Sparks* [1964] Crim LR 717; *Blyth v Blyth* [1966] AC 643, [1966] 1 All ER 524, HL; and 'Withdrawal of Appeal', the Times, 20 October 1964. Cf *Chalmers v Shackell* (1834) 6 C & P 475 (forgery); *Willmetts v Harmer* (1839) 8 C & P 695; *Roberts v Richards* (1862) 3 F & F 507 (theft by employee). As to strictness of pleading cf *Hickinbotham v Leach* (1842) 10 M & W 361 at 363; *Wootton v Sievier* [1913] 3 KB 499, CA. As to particulars of justification see PARA 190 post; and as to spent convictions see PARA 92 post. As to substantial justification where the plaintiff's sentence for an offence is overstated by the defendant but not sufficiently to affect the substantial accuracy and truth of the libel see *Alexander v North Eastern Rly Co* (1865) 6 B & S 340; *Gwynn v South-Eastern Rly Co* (1868) 18 LT 738. As to fair and accurate reports see PARA 125 et seq post.

3 See the Civil Evidence Act 1968 s 13(1), (2) (amended by the Defamation Act 1996 s 12(1)); CIVIL PROCEDURE vol 12 (2009) PARA 1209; and *Levene v Roxhan* [1970] 3 All ER 683, [1970] 1 WLR 1322, CA.

4 Every material particular must be proved: see *Weaver v Lloyd* (1824) 2 B & C 678; *Cory v Bond* (1860) 2 F & F 241. In an action by a solicitor for libel, a plea justifying a charge of having disclosed confidential communications may be supported by proof of the disclosure of communications made to him by his clients which are not so strictly privileged as to prevent his examination as a witness: *Moore v Terrell* (1833) 4 B & Ad 870. As to the effect of pleading a justification on the question of express malice and damages see PARAS 152 note 4, 251-254 post. As to giving evidence in mitigation of damages see PARA 260 et seq post.

5 *Wakley v Cooke* (1849) 4 Exch 511.



6 See eg *Sutherland v Stopes* [1925] AC 47 at 74, HL, per Lord Shaw of Dunfermline. As to spent convictions see PARA 92 post.

7 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, sub nom *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151, HL, where it was held that the ordinary person would not infer guilt of fraud merely from the existence of an inquiry by the fraud squad into the plaintiff's affairs.

8 See *Hewson v Cleeve* [1904] 2 IR 536, Ir CA.

## UPDATE

### 91 Proof of justification

NOTE 8--See *Hamilton v Al Fayed (No 2)* (1999) Times, 30 March, CA (admissions of similar conduct by third party not probative that allegations concerning plaintiff justified).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/92. Rehabilitated offenders.

### 92. Rehabilitated offenders.

Where the plaintiff is a rehabilitated person, and the words complained of impute that he has committed, been charged with, prosecuted for, convicted of or sentenced for an offence which is the subject of a spent conviction<sup>1</sup>, there is no restriction on the defendant pleading and proving that spent conviction to support a plea of justification<sup>2</sup>, but the defence of justification will be defeated if the publication is proved to have been made with malice<sup>3</sup>. This is the only occasion when the defence of justification is defeasible on proof of malice.

1 For the meaning of 'rehabilitated person' and 'spent conviction' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 661.

2 Rehabilitation of Offenders Act 1974 s 8(3). As to the general restriction on adducing evidence of spent convictions see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 664-665.

3 Ibid s 8(5). As to malice see PARA 149 et seq post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(1) JUSTIFICATION/93. Justification in reliance on facts subsequent to publication.

### 93. Justification in reliance on facts subsequent to publication.

The defendant is entitled to rely on facts which occurred after the publication of the words complained of, provided that they go to support the allegations made<sup>1</sup> as at the time of publication<sup>2</sup>.

1 *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407 at 409, [1968] 1 WLR 916 at 919, CA, per Lord Denning MR; see also *Maisel v Financial Times Ltd* [1915] 3 KB 336, CA; *Godman v Times Publishing Co Ltd* [1926] 2 KB 273, CA.

2 *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282 at 288, [1988] 1 WLR 116n at 121, CA, per Neill LJ.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(i) Nature of the Defence/94. Privilege generally.

## **(2) ABSOLUTE PRIVILEGE**

### **(i) Nature of the Defence**

#### **94. Privilege generally.**

The doctrine of privilege in the law of defamation must be distinguished from evidential privilege<sup>1</sup>. In defamation, privilege constitutes a defence. Its rationale is that, unless the general principle of strict liability for the publication of defamatory material is relaxed in relation to certain occasions, the public interest and the common convenience and welfare of society will suffer<sup>2</sup> because persons will be deterred by the fear of suit from expressing themselves freely on matters of importance, and the public will be denied information about parliamentary and court proceedings<sup>3</sup>. Even when the defence of absolute privilege does not apply, public policy may in exceptional cases preclude the bringing of an action upon defamatory words<sup>4</sup>.

1 As to evidential privilege see CIVIL PROCEDURE vol 11 (2009) PARA 970 et seq; CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 501.

2 See *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193; *Stuart v Bell* [1891] 2 QB 341 at 346, CA.

3 As to absolute privilege see *Dawkins v Lord Paulet* (1869) LR 5 QB 94 at 116 per Mellor J; *Trapp v Mackie* [1979] 1 All ER 489 at 491, [1979] 1 WLR 377 at 379, HL, per Lord Diplock. See also *Bottomley v Brougham* [1908] 1 KB 584 at 587 per Channel J, quoted with approval in *Burr v Smith* [1909] 2 KB 306 at 311, CA; *More v Weaver* [1928] 2 KB 520 at 522, CA, per Scrutton LJ. See also *Munster v Lamb* (1883) 11 QBD 588 at 604, CA, per Brett MR, and at 606-607 per Fry LJ; *Scott v Stansfield* (1868) LR 3 Exch 220 at 223 per Kelly CB.

4 See *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475, [1985] 1 All ER 173, CA.

## **UPDATE**

### **94-108 Absolute Privilege**

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(i) Nature of the Defence/95. Absolute and qualified privilege.

## 95. Absolute and qualified privilege.

Both at common law and by statute, the law recognises two levels of privilege:

- 26 (1) absolute privilege, which applies only to occasions and reports of high public importance; words published or reported on such occasions can never be the subject of suit, even if the defendant was actuated by express malice<sup>1</sup>;
- 27 (2) qualified privilege, which applies to a far wider range of occasions and reports; if the defendant establishes that his words are protected by qualified privilege, strict liability ceases to apply and the plaintiff must prove that the defendant was actuated by express malice<sup>2</sup>.

1 *Munster v Lamb* (1883) 11 QBD 588 at 600, CA, per Brett MR.

2 As to qualified privilege see PARA 109 et seq post; and as to express malice see PARA 149 post.

### UPDATE

#### 94-108 Absolute Privilege

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Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(i) Nature of the Defence/96. The occasions of absolute privilege.

## 96. The occasions of absolute privilege.

The occasions of absolute privilege may be classified as:

- 28 (1) the administration of justice;
- 29 (2) reports of court proceedings;
- 30 (3) parliamentary proceedings and papers;
- 31 (4) affairs of state; and
- 32 (5) other express statutory instances.

These heads are considered further below<sup>1</sup>.

1 See PARA 97 et seq post.

### UPDATE

## 94-108 Absolute Privilege

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Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(ii) Application of the Defence/A. ADMINISTRATION OF JUSTICE AND REPORTS/97. Absolute privilege.

### (ii) Application of the Defence

#### A. ADMINISTRATION OF JUSTICE AND REPORTS

##### 97. Absolute privilege.

No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law<sup>1</sup>. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not<sup>2</sup>. The privilege extends to documents properly used and regularly prepared for use in the proceedings<sup>3</sup>. Advocates<sup>4</sup>, judges<sup>5</sup> and juries<sup>6</sup> are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings<sup>7</sup>.

A separate action for malicious prosecution or the malicious institution or abuse of civil proceedings may lie independently of the law of defamation<sup>8</sup>.

1 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 263, Ex Ch; *Munster v Lamb* (1883) 11 QBD 588 at 606, CA; see also *R v Skinner* (1772) Lofft 54. For the basis of this doctrine see PARA 94 ante. The immunity is from civil actions of any sort and is not confined to defamation: *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA; see also *Glick v Hinchcliffe* (1967) 111 Sol Jo 927, CA. If words spoken are opprobrious or irrelevant, the court may take notice of them as a contempt, and if anything of bad intention is found on such inquiry it will be punished: see *R v Skinner* supra.

2 *Munster v Lamb* (1883) 11 QBD 588 at 601, CA; *Seaman v Netherclift* (1876) 2 CPD 53, CA, where an answer was given by a witness on another matter in relation to a question directed to his credit; *Henderson v Broomhead* (1859) 4 H & N 569, Ex Ch (statement in affidavit); *Revis v Smith* (1856) 18 CB 126 (statement in affidavit); *Kennedy v Hilliard* (1859) 10 ICLR 195 (irrelevant statement expunged from affidavit as scandalous); *Trotman v Dunn* (1815) 4 Camp 211; *McLaughlin v Doey* (1893) 32 LR Ir 518; *Doyle v O'Doherty* (1842) Car & M 418; *Gompas v White* (1889) 54 JP 22, DC (affidavits in interlocutory proceedings). The immunity of a witness in this respect is settled law and cannot be doubted: *Watson v M'Ewan* [1905] AC 480 at 486, HL, per Lord Halsbury CJ, applied in *Hargreaves v Bretherton* [1959] 1 QB 45 at 54, [1958] 3 All ER 122 at 125 per Lord Goddard CJ. See also *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA.

3 *Watson v M'Ewan* [1905] AC 480, HL (statement to solicitor for purposes of preparing proof of evidence), applied in *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA (statements submitted to the Director of

Public Prosecutions and incorporated in notices of additional evidence); *Waple v Surrey County Council* [1997] 2 All ER 836 (solicitor for one party requesting solicitor for the other party for information regarding the case which his client would advance; answer given was privileged). See, however para 8 note 8 ante.

4 See LEGAL PROFESSIONS vol 66 (2009) PARA 1143; *Munster v Lamb* (1883) 11 QBD 588, CA. A solicitor, acting as advocate, has the same privilege as a barrister: *Mackay v Ford* (1860) 5 H & N 792; and see LEGAL PROFESSIONS vol 65 (2008) PARA 739. As to the extension of privilege to authorised advocates and litigators who are not barristers or solicitors see the Courts and Legal Services Act 1990 s 63.

5 See eg *Scott v Stansfield* (1868) LR 3 Exch 220; *Anderson v Gorrie* [1895] 1 QB 668 at 671, CA; *Fray v Blackburn* (1863) 3 B & S 576 at 578.

6 See JURIES vol 61 (2010) PARA 857.

7 See *Delegal v Highley* (1837) 3 Bing NC 950 at 961, where an observation by a chief clerk after evidence had been given was not protected; *Keenan v Wallace* (1916) 51 ILT 19 (statement by police inspector before differently constituted petty sessional court regarding previous proceedings). Possibly some statements by witnesses made at judicial proceedings but not with reference to the subject matter of the proceedings, nor in answer to questions going to their credit, may not be protected: see *Seaman v Netherclift* (1876) 2 CPD 53 at 60, CA.

8 See *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729, HL; *Martin v Watson* [1996] AC 74, [1995] 3 All ER 559, HL; and TORT vol 45(2) (Reissue) PARA 458 et seq.

## UPDATE

### 94-108 Absolute Privilege

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### 97 Absolute privilege

NOTE 1--Absolute privilege does not extend to communications with the Parole Board, as its proceedings are not part of the proceedings of a court of law: *Daniels v Griffiths* [1998] EMLR 489, CA.

NOTE 2--See also *Smeaton v Butcher* [2000] EMLR 985, CA (absolute privilege extends to communication of witness statement referring to subject matter of inquiry in related proceedings).

NOTE 3--*Waple*, cited, reversed: [1998] 1 All ER 624, [1998] 1 WLR 860, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(ii) Application of the Defence/A. ADMINISTRATION OF JUSTICE AND REPORTS/98. To what tribunals the doctrine extends.

### 98. To what tribunals the doctrine extends.

The doctrine of absolute privilege is not confined to the administration of justice in the superior courts<sup>1</sup>. It has been applied in its fullest extent to county courts<sup>2</sup>, coroners' courts<sup>3</sup> and magistrates' courts<sup>4</sup>. It applies not only to all kinds of courts of justice<sup>5</sup>, but also to other tribunals recognised by law and acting judicially<sup>6</sup>, including the Solicitors Disciplinary Tribunal<sup>7</sup>, proceedings before the Benchers of an Inn of Court<sup>8</sup>, a statutory tribunal established to determine industrial differences where witnesses were not sworn but were liable to prosecution for making a false statement<sup>9</sup>, an inquiry set up by the Secretary of State under statutory powers into the dismissal of a headmaster<sup>10</sup>, and licensing justices<sup>11</sup>. In determining whether a particular tribunal or body is to be treated as a judicial one, such that its proceedings are covered by absolute privilege, the court will look to:

- 33 (1) the authority under which that tribunal or body acts;
- 34 (2) the nature of the question into which it is its duty to inquire;
- 35 (3) the procedure it adopts; and
- 36 (4) the legal consequences of the conclusion it reaches<sup>12</sup>.

Statutory privilege, analogous to absolute privilege in the administration of justice, has been conferred in respect of certain tribunals<sup>13</sup>, but has not been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act<sup>14</sup>. The doctrine does not apply to tribunals which merely discharge administrative functions<sup>15</sup>.

1 *Dawkins v Lord Paulet* (1869) LR 5 QB 94 at 116.

2 *Scott v Stansfield* (1868) LR 3 Exch 220 at 225. If the judge in a county court is guilty of misconduct in the exercise of his office, the Lord Chancellor may, if he thinks it expedient, remove him from such office, but no action would lie against him for anything done by him in his judicial capacity: *Scott v Stansfield* supra. As to an order beyond the county court's jurisdiction made under a mistake of the law and not of the facts see *Houlden v Smith* (1850) 14 QB 841. See also *Tughan v Craig* [1918] 1 IR 245.

3 *Thomas v Churton* (1862) 2 B & S 475.

4 *Law v Llewellyn* [1906] 1 KB 487, CA, where the statement of claim was struck out, and it was held that a magistrate, when sitting in the course of his judicial duties, is a judge within the rule laid down in *Munster v Lamb* (1883) 11 QBD 588, CA. See also *Hodson v Pare* [1899] 1 QB 455, CA; cf *Lilley v Roney* (1892) 61 LJQB 727, DC; *Gompas v White* (1889) 6 TLR 20, DC. A magistrate's observations, in the course of his judicial duties, in reference to the withdrawal of a charge are not actionable, whether made before or after the leave to withdraw has been given: *Law v Llewellyn* supra at 493.

5 *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431 at 442, CA, per Lord Esher MR; and see the cases cited in PARA 97 notes 1, 7 ante.

6 As to the words 'recognised by law' see *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 263, Ex Ch; *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA; and *Barratt v Kearns* [1905] 1 KB 504 at 510, CA, where the description applied to an ecclesiastical inquiry authorised by statute before commissioners whose duty it was to hear evidence and report on the matter referred to them, and in respect of a statement made by a witness in the course of such proceedings; there was an absolute immunity from liability to action, and the defendant could not be interrogated as to the statements which he made. In *Barratt v Kearns* supra the evidence before the commissioners was not taken on oath, which was also the case in *Dawkins v Lord Rokeby* supra (a military court of inquiry); affd (1875) LR 7 HL 744. In *Barratt v Kearns* supra the omission to take evidence on oath was held not to be a mistake which vitiated the whole proceedings or altered the character of the tribunal: see at 511 per Cozens Hardy LJ. See also *Jekyll v Moore* (1806) 2 Bos & PNR 341; *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405, where the doctrine was applied to a military service tribunal. As to what is a court in law see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 199.

7 As to the Solicitors Disciplinary Tribunal see LEGAL PROFESSIONS vol 66 (2009) PARA 906 et seq. The tribunal's findings and orders made by it are also absolutely privileged: see *Addis v Crocker* [1961] 1 QB 11, [1960] 2 All ER 629, CA.

8 *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA; *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA; cf note 14 infra.

9 *Slack v Barr* (1918) 82 JP 91.

10 *Trapp v Mackie* [1979] 1 All ER 489, [1979] 1 WLR 377, HL, where the authorities are reviewed.

11 See *R v East Riding of Yorkshire Quarter Sessions, ex p Newton* [1968] 1 QB 32, [1967] 3 All ER 118, CA; the Justices of the Peace Act 1997 s 51; the Magistrates' Courts Act 1980 s 148(1); and MAGISTRATES.

12 *Trapp v Mackie* [1979] 1 All ER 489 at 492, [1979] 1 WLR 377 at 379, HL, per Lord Diplock. For a helpful instance of the application of this test see *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475, [1985] 1 All ER 173, CA (EC Commission investigation under the EC Treaty (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 89; the investigation was administrative, not judicial); and see also *A-G v British Broadcasting Corp* [1981] AC 303, [1980] 3 All ER 161, HL (contempt of court).

13 See eg the German Conventions Act 1955 s 1(1) (Arbitration Tribunal, Supreme Restitution Court and Arbitral Commission on Property, Rights and Interests in Germany).

14 A complaint to the Bar Council about a barrister is not absolutely privileged because the council does not exercise judicial functions in relation to such complaints: *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA. See also *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA, where it was held that a county council was there acting in discharge of consultative and administrative, and not judicial, functions and that a member of the council was only entitled to qualified privilege, as to which see PARA 109 et seq post. As to the decisions of the Jockey Club see *Hope v l'Anson and Weatherby* (1901) 18 TLR 201, CA; *Chapman v Lord Ellesmere* [1932] 2 KB 431, CA, where the question was whether the communication was within the law relating to qualified privilege; and *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA. See also *Proctor v Webster* (1885) 16 QBD 112, DC, distinguishing *Lake v King* (1670) 1 Wms Saund (1845 Edn) 131 and *Hare and Meller's Case* (1587) 3 Leon 138, 163. As to express malice see PARA 149 et seq post.

15 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA (see note 14 supra); *Collins v Henry Whiteway & Co* [1927] 2 KB 378 (communications made to the court of referees constituted under the Unemployment Insurance Act 1920 (repealed) not absolutely privileged); *Mason v Brewis Bros Ltd* [1938] 2 All ER 420 (similar decision); *Smith v National Meter Co Ltd* [1945] KB 543, [1945] 2 All ER 35 (statements submitted to medical referee under the Workmen's Compensation Act 1925 (repealed) not absolutely privileged); *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA; *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475, [1985] 1 All ER 173, CA (EC Commission investigation under the EC Treaty art 89 administrative not judicial); *Purdew v Seress-Smith* [1993] IRLR 77 (social security adjudication administrative).

## UPDATE

### 94-108 Absolute Privilege

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### 98 To what tribunals the doctrine extends

TEXT AND NOTES--Statements made to the Office for the Supervision of Solicitors attract absolute privilege: *Gray v Avadis* [2003] EWHC 1830 (QB), [2003] All ER (D) 528 (Jul).

NOTE 11--Justices of the Peace Act 1997 repealed: Courts Act 2003 s 6(4), Sch 10.

NOTE 12--See also *Mahon v Rahn (No 2)* [2000] 4 All ER 41, CA (defence of absolute privilege available in a Securities Association tribunal).

NOTE 13--See also Higher Education Act 2004 s 17; and EDUCATION vol 15(2) (2006 Reissue) PARA 1040.

NOTE 14--Communications to conciliators or staff of the Advisory, Conciliation and Arbitration Service ('ACAS') attract absolute privilege: *Freer v Glover* [2005] EWHC 3341 (QB), [2006] IRLR 521.

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### **99. Application to all stages of proceedings.**

Absolute privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings<sup>1</sup>, including statements in pleadings<sup>2</sup> and witness statements<sup>3</sup> and communications passing between a solicitor and his client on the subject on which the client has retained the solicitor and which are relevant to the matter<sup>4</sup>. Further, the defence may extend to any statement which is part of the process of investigating a crime or possible crime<sup>5</sup>.

1 *Watson v M'Ewan, Watson v Jones* [1905] AC 480, HL; *Beresford v White* (1914) 30 TLR 591, CA; *Lilley v Roney* (1892) 61 LJQB 727, DC (letter to the Law Society and affidavit of complaint against a solicitor); *Pedley v Morris* (1891) 61 LJQB 21 (written objections lodged on taxation of bill of costs); *Bottomley v Brougham* [1908] 1 KB 584; affd in *Burr v Smith* [1909] 2 KB 306, CA (report of official receiver under former companies legislation; officer appointed by the Board of Trade had in the performance of his duties prepared and delivered a report on certain matters for the purpose of its being laid by the board before Parliament as part of its annual report; held that a libel action would not lie in respect of statements contained in that report); and see *Waple v Surrey County Council* [1997] 2 All ER 836 cited in PARA 97 note 3 ante.

2 *Seaman v Netherclift* (1876) 1 CPD 540 at 544-545; *Nathuji Muleshvar v Lalbhai Ravidat* (1889) 1 LR 14 Bom 97; *Rome v Watson* (1898) 25 R 733, Ct of Sess.

3 As to affidavits, witness proofs and statements and like documents see PARA 97 note 2 ante.

4 *More v Weaver* [1928] 2 KB 520, CA; see also *Minter v Priest* [1930] AC 558, HL, where it was held that communications passing between a solicitor and a would-be client, and relevant to the matter on which advice is sought, are protected from disclosure, but the correctness of the decision in *More v Weaver* supra that communications between solicitor and client are absolutely privileged was left open for future consideration by the House of Lords. See also *Groom v Crocker* [1937] 3 All ER 844; affd [1939] 1 KB 194, [1938] 2 All ER 394, CA; the cases cited in note 1 supra; and LEGAL PROFESSIONS vol 65 (2008) PARAS 739-740; LEGAL PROFESSIONS vol 66 (2009) PARA 1032.

5 *Evans v London Hospital Medical College* [1981] 1 All ER 715 at 720, [1981] 1 WLR 184 at 191 per Drake J; approved in *X v Bedfordshire County Council* [1995] 2 AC 633 at 755, [1995] 3 All ER 353 at 386, HL, per Lord Browne-Wilkinson.

## **UPDATE**

### **94-108 Absolute Privilege**

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is



absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

## 99 Application to all stages of proceedings

NOTE 5--See also *Taylor v Serious Fraud Office* [1998] 4 All ER 801, HL (correspondence between a lawyer employed by the Serious Fraud Office and the Attorney General for the Isle of Man and a file note created by the solicitor concerning the investigation of a fraud protected by absolute privilege); *Buckley v Dalziel* [2007] EWHC 1025 (QB), [2007] 1 WLR 2933 (communication to police officer in witness statement protected by absolute privilege); and *Westcott v Westcott* [2008] EWCA Civ 818, [2009] 1 All ER 727 (criminal complaint to police protected by absolute privilege).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(ii) Application of the Defence/A. ADMINISTRATION OF JUSTICE AND REPORTS/100. Contemporaneous reports of court proceedings.

## 100. Contemporaneous reports of court proceedings.

A fair and accurate report<sup>1</sup> of proceedings in public before a court to which the following provisions apply, if published<sup>2</sup> contemporaneously with proceedings, is absolutely privileged<sup>3</sup>. A report of proceedings which by an order of the court, or as a consequence of any statutory provision<sup>4</sup>, is required to be postponed is treated as published contemporaneously if it is published as soon as practicable after publication is permitted<sup>5</sup>.

These provisions apply to:

- 37 (1) any court<sup>6</sup> in the United Kingdom<sup>7</sup>;
- 38 (2) the European Court of Justice or any court attached to that court;
- 39 (3) the European Court of Human Rights; and
- 40 (4) any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the United Kingdom is a party<sup>8</sup>.

1 As to the meaning of 'fair and accurate report' see PARA 128 post.

2 For these purposes, 'publication' and 'publish', in relation to a statement, have the meaning they have for the purposes of the law of defamation generally: Defamation Act 1996 s 17(1). For the meaning of 'statement' see PARA 10 note 1 ante.

3 Ibid s 14(1). At the date at which this volume states the law, s 14 had not been brought into force. The former requirement that the report be in a newspaper or broadcast is not part of the 1996 Act.

4 For these purposes, 'statutory provision' means a provision contained in an Act or in subordinate legislation within the meaning of the Interpretation Act 1978 (see STATUTES vol 44(1) (Reissue) PARA 1232) or a statutory provision within the meaning given by the Interpretation Act (Northern Ireland) 1954 s 1(f): Defamation Act 1996 s 17(1).

5 Ibid s 14(2); and see note 3 supra.

6 For the purposes of head (1) in the text, 'court' includes any tribunal or body exercising the judicial power of the state: ibid s 14(3); and see note 3 supra. As to such tribunals and bodies see PARA 98 ante and the authorities there cited, especially *Trapp v Mackie* [1979] 1 All ER 489, [1979] 1 WLR 377, HL; see also *A-G v*

*British Broadcasting Corpn* [1981] AC 303, [1980] 3 All ER 161, HL on the related question of which bodies are 'courts' for the purpose of the law of contempt.

7 For the meaning of 'United Kingdom' see PARA 76 note 3 ante.

8 Defamation Act 1996 s 14(3); and see note 3 supra. As to international criminal tribunals see further WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 463.

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

### 100 Contemporaneous reports of court proceedings

NOTE 3--1996 Act s 14 now in force: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(ii) Application of the Defence/A. ADMINISTRATION OF JUSTICE AND REPORTS/101. Rehabilitated offenders.

#### 101. Rehabilitated offenders.

Where the plaintiff is a rehabilitated person and the words complained of impute that he has committed, been charged with, prosecuted for, convicted of or sentenced for an offence which is the subject of a spent conviction<sup>1</sup>, there is no restriction on the defendant, where appropriate, pleading and proving the spent conviction to support a defence of absolute privilege<sup>2</sup>, except where the defence is that the matter published constituted a fair and accurate report of judicial proceedings and evidence of a spent conviction was ruled inadmissible<sup>3</sup> in those proceedings<sup>4</sup>. However, that exception does not apply in relation to (1) any report contained in a bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law<sup>5</sup>; or (2) any report or account of judicial proceedings published for bona fide educational, scientific or professional purposes or given in the course of any lecture, class or discussion given or held for any of those purposes<sup>6</sup>.

1 For the meaning of 'rehabilitated person' and 'spent conviction' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 661.

2 Rehabilitation of Offenders Act 1974 s 8(3). As to the general restriction on adducing evidence of spent convictions see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 664-665. As to qualified privilege see PARA 121 post.

3 le under *ibid* s 4(1): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 664-665.

4 See *ibid* s 8(6) (prospectively amended by the Defamation Act 1996 s 14(4)).

5 Rehabilitation of Offenders Act 1974 s 8(7)(a).

6 *Ibid* s 8(7)(b).

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

### 101 Rehabilitated offenders

NOTE 4--Amendment now in force: SI 1999/817.

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## **B. PARLIAMENTARY PROCEEDINGS AND REPORTS**

### **102. Proceedings in Parliament.**

Words spoken by a member of Parliament in Parliament are absolutely privileged, and the court has no jurisdiction to entertain an action in respect of them<sup>1</sup>. When Parliament is sitting and statements are made in either House, the member making them is not amenable to the civil or criminal law, even if the statements are false to his knowledge, and a conspiracy to make such statements would not make the members guilty of it amenable to the criminal law<sup>2</sup>. However, this privilege does not extend to a statement published by a member outside the House, even where it is a reproduction of what was said in the House, and made in consequence of the appearance of an incorrect publication in the newspapers<sup>3</sup>; and a letter from a member to a minister, even on a matter of public concern, is probably not entitled to absolute privilege<sup>4</sup>.

Absolute immunity attaches to the evidence given by witnesses before select committees of the House of Commons<sup>5</sup> and to reports by the Parliamentary Commissioner for Administration to Parliament and other matters relating to his investigations<sup>6</sup>.

<sup>1</sup> *Dillon v Balfour* (1887) 20 LR Ir 600; cf *Rivlin v Bilainkin* [1953] 1 QB 485, [1953] 1 All ER 534 (no privilege allowed for a publication to a member unconnected with the proceedings).

2 *Ex p Wason* (1869) LR 4 QB 573 at 576; and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 40.

3 *R v Creevey* (1813) 1 M & S 273; *R v Lord Abingdon* (1794) 1 Esp 226; and see *R v Salisbury* (1698) 1 Ld Raym 341.

4 See 591 HC Official Report (5th series) cols 208-346 (member's letter to a minister considered not to be a proceeding in Parliament). Such a letter would be entitled to qualified privilege: see PARA 109 et seq post. As to what are proceedings in Parliament see PARLIAMENT vol 78 (2010) PARA 1082; and see further, for guidance as to matters likely to attract parliamentary absolute privilege, the Defamation Act 1996 s 13(5); and PARA 104 post.

5 *Goffin v Donnelly* (1881) 6 QBD 307; see also *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, Ex Ch; affd (1875) LR 7 HL 744.

6 The following publications are absolutely privileged: (1) any matter published by a member of the House of Commons in communicating with the Parliamentary Commissioner for Administration and his officers or by him or his officers in communicating with the member; (2) any matter published by the Parliamentary Commissioner in making a report to either House of Parliament; (3) publications by a member of the House of Commons to the person by whom the complaint was made of a report or statement sent to the member in respect of the complaint; and (4) publications by the Parliamentary Commissioner to the principal officer of the department or authority concerned and to any other person who is alleged in a complaint to have taken or authorised the action complained of, of a report of the results of the investigation: Parliamentary Commissioner Act 1967 s 10(5). As to the Parliamentary Commissioner see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 41 et seq.

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

### 102 Proceedings in Parliament

NOTE 1--Parliamentary privilege is not in breach of the right to a fair trial under the European Convention on Human Rights art 6(1) on the grounds of access to court being denied: Application 35373/97 *A v United Kingdom* (2002) 13 BHRC 623, ECtHR.

NOTE 3--See *Buchanan v Jennings* [2004] UKPC 36, [2005] 1 AC 115.

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### 103. Impeaching or questioning parliamentary proceedings.

The freedom of speech and debates or proceedings in Parliament may not be impeached or questioned in any court or place out of Parliament<sup>1</sup>. Therefore, not only are statements made in or in connection with parliamentary proceedings immune from suit under the doctrine of

absolute privilege<sup>2</sup> but, subject to waiver<sup>3</sup>, no court in any proceedings will hear or inquire into allegations about issues arising in or concerning the Houses of Parliament, such as whether a member had misled the House or acted there from improper motives<sup>4</sup>. If, in a libel action, such an issue arises, for example on a plea of justification or fair comment, it will be struck out; and if the issue is so central to the action that it would not be just to proceed without considering such evidence, the action will be stayed<sup>5</sup>. This principle applies not only to actions brought against members in respect of statements outside the House, but also to actions brought by them in respect of criticisms of their parliamentary conduct, and even to actions between third parties in which the conduct of members or others involved in parliamentary proceedings becomes relevant<sup>6</sup>.

1 Bill of Rights (1688 or 1689) s 1. As to the history and citation of the Bill of Rights see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 35. As to parliamentary privilege see further PARLIAMENT vol 78 (2010) PARA 1076 et seq.

2 See PARA 102 ante.

3 As to waiver see the Defamation Act 1996 s 13; and PARA 104 post.

4 See *Bradlaugh v Gossett* (1884) 12 QBD 271; *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, [1972] 1 All ER 378; *British Railways Board v Pickin* [1974] AC 765, [1974] 1 All ER 609, HL; *Pepper v Hart* [1993] AC 593, [1993] 1 All ER 42, HL.

5 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, [1994] 3 All ER 407, PC; applied in *Allason v Haines* [1996] EMLR 143. Note that these cases precede the enactment of the Defamation Act 1996 s 13.

6 Eg a libel brought by a lobbyist against a newspaper in respect of allegations concerning the lobbyist's relations with members.

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(ii) Application of the Defence/B. PARLIAMENTARY PROCEEDINGS AND REPORTS/104. Waiver of parliamentary privilege.

### 104. Waiver of parliamentary privilege.

The rule of law which protects persons from legal liability for words spoken or things done in the course of or for the purposes of or incidental to any proceedings in Parliament<sup>1</sup> cannot be waived save perhaps by resolution of Parliament itself; and nothing in the following provisions affects any enactment or rule of law so far as it protects a person<sup>2</sup> from legal liability for words

spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament<sup>3</sup>, including:

- 41 (1) the giving of evidence before either House or a committee<sup>4</sup>;
- 42 (2) the presentation or submission of a document to either House or a committee;
- 43 (3) the preparation of a document for the purposes of or incidental to the transacting of any such business;
- 44 (4) the formulation, making or publication of a document, including a report, by or pursuant to an order of either House or a committee; and
- 45 (5) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests<sup>5</sup>.

Where, however, the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law<sup>6</sup> which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament<sup>7</sup>.

The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it<sup>8</sup>.

Not only members of Parliament, but any other person whose conduct in relation to parliamentary proceedings is in question in defamation proceedings, may waive the rule, or rely on it, as he chooses<sup>9</sup>.

Where a person waives that protection:

- 46 (a) any such enactment or rule of law is not to apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct; and
- 47 (b) none of those things is to be regarded as infringing the privilege of either House of Parliament<sup>10</sup>.

So far as concerns that person, there is then no basis for the defamation action to be struck out or stayed as infringing Parliamentary privilege<sup>11</sup>.

1    Ie the common law defence of absolute privilege considered in PARA 102 ante.

2    Ie including a person who has waived the protection for the purposes of the Defamation Act 1996 s 13(1), (2): see the text and notes 7, 10 infra.

3    Ibid s 13(4).

4    For these purposes, 'a committee' means a committee of either House or a joint committee of both Houses of Parliament: ibid s 13(5).

5    Ibid s 13(5). As to the Parliamentary Commissioner for Standards and the register of members' interests see PARLIAMENT vol 78 (2010) PARA 1069 et seq.

6    See the Bill of Rights (1688 or 1689) s 1; and PARA 103 ante. As to the history and citation of the Bill of Rights see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 35.

7    Defamation Act 1996 s 13(1).

8    Ibid s 13(3).

9    Eg a lobbyist whose conduct in relation to members of Parliament is criticised.

10 Defamation Act 1996 s 13(2). As to parliamentary privilege see further PARLIAMENT vol 78 (2010) PARA 1076 et seq.

11 See PARA 103 text and note 5 ante.

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

### 104 Waiver of parliamentary privilege

NOTE 7--Once parliamentary privilege has been waived all parliamentary proceedings may be questioned: *Hamilton v Al Fayed* [2000] 2 WLR 609, HL

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### 105. Authorised reports and copies of parliamentary proceedings.

Without prejudice to any of the privileges of Parliament<sup>1</sup>, persons who publish under the direct authority of either House of Parliament have the statutory protection of a summary stay of proceedings, civil or criminal, in respect of reports, papers, votes or proceedings of either House, while those who, although not acting under the direct authority of either House, publish a correct copy<sup>2</sup> of such reports, papers, votes or proceedings have a somewhat similar statutory protection<sup>3</sup>.

Unlike reports of court proceedings, fair and accurate reports of parliamentary proceedings are not protected by absolute privilege, but merely by qualified privilege<sup>4</sup>.

1 As to parliamentary privilege see PARLIAMENT vol 78 (2010) PARA 1076 et seq.

2 Extracts from or abstracts of parliamentary proceedings are given only a qualified privilege by the Parliamentary Papers Act 1840 s 3 (as amended): see PARA 134 post.

3 This states the effect of ibid ss 1, 2, 4, as laid down in *Mangena v Wright* [1909] 2 KB 958 at 975-976 per Phillimore J; following *Mangena v Edward Lloyd Ltd* (1908) 98 LT 640 at 641-644 per Darling J; revsd on the facts 99 LT 824, CA; and referring to *Houghton v Plimsoll* (1874) Times, 2 April (see PARA 134 note 4 post).

4 See PARA 134 post.

## UPDATE

## 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

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### C. AFFAIRS OF STATE

#### 106. Absolute privilege in affairs of state.

For reasons of the highest policy and convenience, ministers of the Crown cannot be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals<sup>1</sup>. Similarly, an action will not lie against a military or naval officer, at the suit of a military or naval Crown employee, in respect of a report published or any act done in the course of his duty as such officer, even if the report is made or the act done maliciously and without reasonable or probable cause<sup>2</sup>. Official communications relating to state affairs, made between officers of state in the course of their duty, will be protected by absolute privilege<sup>3</sup>, even if the subject matter of the communication is a commercial one<sup>4</sup>. It is uncertain whether a report by one senior police officer to another is absolutely privileged<sup>5</sup>.

1 *Dawkins v Lord Paulet* (1869) LR 5 QB 94 at 117 per Mellor J; *Munster v Lamb* (1883) 11 QBD 588 at 606, CA, per Fry LJ. As to the Parliamentary Commissioner for Administration see PARA 102 text and note 6 ante.

2 *Dawkins v Lord Paulet* (1869) LR 5 QB 94 (libel action) per Mellor and Lush JJ, Cockburn CJ dissenting. See also *Sutton v Johnstone* (1785) 1 Term Rep 493 at 503; revsd on the facts (1786) 1 Term Rep 510 at 544, 549-550, Ex Ch (action by naval officer for malicious prosecution); *Dawkins v Lord Rokeby* (1866) 4 F & F 806 at 841; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 271-272, Ex Ch; *Grant v Gould* (1792) 2 Hy Bl 69 at 100-101; *Barwis v Keppel* (1766) 2 Wils 314. Cf *Heddon v Evans* (1919) 35 TLR 642 at 644-645. *Dickson v Earl of Wilton* (1859) 1 F & F 419, and *Dickson v Viscount Combermere* (1863) 3 F & F 527, were criticised by Lush J in *Dawkins v Lord Paulet* supra at 122. *Dickson v Earl of Wilton* supra was distinguished in *Dawkins v Lord Rokeby* supra at 272, *Warden v Bailey* (1811) 4 Taunt 67 being there explained as an instance of an act done without any colour of law, as if an officer had ordered a soldier to be imprisoned in a debtors' prison for non-payment of an alleged debt. As to *Warden v Bailey* supra and *Bailey v Warden* (1815) 4 M & S 400 see the dissenting judgment of Cockburn CJ in *Dawkins v Lord Paulet* supra. See also *Home v Lord Bentinck* (1820) 2 Brod & Bing 130, Ex Ch; *Oliver v Lord Bentinck* (1811) 3 Taunt 456; *Jekyll v Moore* (1806) 2 Bos & PNR 341; and see 1 Wms Saund (1871 Edn) 138, 139 note (b).

3 *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, CA.

4 *M Isaacs & Sons Ltd v Cook* [1925] 2 KB 391.



5 *Merricks v Nott-Bower* [1965] 1 QB 57, [1964] 1 All ER 717, CA. However, only qualified privilege has been attached to a report by a police inspector to a superior officer: *Gibbons v Duffell* (1932) 47 CLR 520 (Aust HC); see also *Richards v Naum* [1967] 1 QB 620, [1966] 3 All ER 812, CA.

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

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### 107. Foreign state communications.

The concepts of international comity and the inviolability of diplomatic communications require that documents passing between members of a foreign embassy be protected by absolute privilege<sup>1</sup>. A communication between a United Kingdom company and the European Commission on a commercial matter is not absolutely privileged, but for reasons of public interest an English court will not adjudicate upon it in a defamation action<sup>2</sup>.

1 *Fayed v Al-Tajir* [1988] QB 712, [1987] 2 All ER 396, CA; see the judgment of Mustill LJ which exhaustively reviews the older authorities and the interrelation between the related doctrines of absolute privilege, act of state and public interest immunity.

2 *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475, [1985] 1 All ER 173, CA (absolute privilege was refused, the commission's function being administrative not judicial; but the public interest doctrine produced the same result).

## UPDATE

### 94-108 Absolute Privilege

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(2) ABSOLUTE PRIVILEGE/(ii) Application of the Defence/C. AFFAIRS OF STATE/108. Statutory absolute privilege for official reports.

### **108. Statutory absolute privilege for official reports.**

Absolute privilege has been expressly conferred by statute in respect of:

- 48 (1) the reports of the Parliamentary Commissioner for Administration to either House of Parliament, together with communications between a member of Parliament and the commissioner or his officers for the purposes of the Parliamentary Commissioner Act 1967, the publication by a member to the complainant of a copy of the commissioner's report in respect of his complaint, the publication by the commissioner to the principal officer of the department or authority concerned and to any other person alleged in the complaint to have taken or authorised the action complained of<sup>1</sup>;
- 49 (2) the reports of the Monopolies and Mergers Commission and the Director General of Fair Trading under the Competition Act 1980<sup>2</sup>;
- 50 (3) the reports of the Local Commissioners for Administration in England and in Wales and publications ancillary thereto<sup>3</sup>; and
- 51 (4) certain statutory tribunals<sup>4</sup>.

1 See the Parliamentary Commissioner Act 1967 s 10; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 44.

2 See the Competition Act 1980 s 16(2); and COMPETITION vol 18 (2009) PARA 10.

3 See the Local Government Act 1974 ss 30-32 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARAS 44, 36.

4 Eg the tribunals created by the German Conventions Act 1955. Most such bodies would probably enjoy absolute privilege as courts at common law in any event, if of a judicial nature: see PARA 98 ante.

### **UPDATE**

#### **94-108 Absolute Privilege**

For the purposes of the law of defamation, the publication by the Secretary of State, a designated judge (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) or the OFT (see COMPETITION vol 18 (2009) PARAS 6-8) of any advice or reasons given by or to him or it in the exercise of functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS) is absolutely privileged: ss 69(2), 119(1) (s 69(2) amended by Enterprise Act 2002 Sch 25 para 23(6); and SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judge' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 2005 Sch 4 para 216).

### **108 Statutory absolute privilege for official reports**

TEXT AND NOTE 2--Monopolies and Mergers Commission dissolved and its functions transferred to Competition Commission: see COMPETITION vol 18 (2009) PARA 9 et seq.

NOTE 3--1974 Act s 32 further amended, s 33A added: Freedom of Information Act 2000 Sch 7 para 4.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(i) Introduction/109. Defence of qualified privilege.

### **(3) QUALIFIED PRIVILEGE**

#### **(i) Introduction**

##### **109. Defence of qualified privilege.**

On grounds of public policy<sup>1</sup> the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are:

- 52 (1) limited communications between persons having a common and corresponding duty or interest to make and receive the communication<sup>2</sup>;
- 53 (2) communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack<sup>3</sup>;
- 54 (3) fair and accurate reports, published generally, of the proceedings of specified persons and bodies<sup>4</sup>.

Since the common law doctrine of qualified privilege is policy-based, it is not possible to list exhaustively all privileged occasions.

1 In *Davies v Sneed* (1870) LR 5 QB 608 at 611, Blackburn J approved the judgments of Tindal CJ and Erle J in *Coxhead v Richards* (1846) 2 CB 569 (from which Coltman and Cresswell JJ dissented, and which were followed in *Blackham v Pugh* (1846) 2 CB 611, and by Willes J in *Amann v Damm* (1860) 8 CBNS 597), and stated that where it is right in the interests of society that a person should tell to another certain facts, then, if in good faith and without malice he does tell them, it is a privileged communication. See also *Stuart v Bell* [1891] 2 QB 341, CA; *Toogood v Spyring* (1834) 1 Cr M & R 181 at 191, 193; and *Whiteley v Adams* (1863) 15 CBNS 392 at 418. In *Stuart v Bell* supra at 346, Lindley LJ said that the reason for holding any occasion privileged is the common convenience or the welfare of society. See also *Macintosh v Dun* [1908] AC 390 at 400, PC; *Gettings v Foss* (1827) 3 C & P 160; *Davis v London Express Newspaper Ltd* (1938) 55 TLR 207, where an inquiry by a newspaper as to sharepushing was held to be a privileged occasion in the absence of malice.

2 See PARA 113 et seq post.

3 See PARA 121 et seq post.

4 See PARA 125 et seq post.

### **UPDATE**

#### **109 Defence of qualified privilege**

NOTES--As to the test to be applied in establishing whether the defence of qualified privilege is available, see *Reynolds v Times Newspapers Ltd* [1998] 3 All ER 961, [1998] 3 WLR 862, CA; *Lange v Atkinson* [2000] 3 NZLR 385, NZCA; *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694, [2004] EMLR 89; *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2006] 4 All ER 1279; *Charman v Orion*

*Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750 (reportage); *Prince Radu of Hohenzollern v Houston* [2008] EWCA Civ 921, [2009] EMLR 242. See also *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2001] 2 All ER 437 (publication of articles alleging football match fixing not protected by qualified privilege); *Seaga v Harper* [2008] UKPC 9, [2008] 1 All ER 965 (publication of defamatory statement not protected by qualified privilege as reliability of information on which statement based was not checked).

There is no rule of practice that courts must direct issues of qualified privilege to be heard as preliminary issues: *MacIntyre v Phillips* [2002] EWCA Civ, 1087, [2003] EMLR 194.

NOTE 1--See *Baigent v McCulloch* 1998 SLT 780, OH (statements made in television interview not protected by qualified privilege).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(i) Introduction/110. Effect of malice.

### **110. Effect of malice.**

It is for the defendant to prove that the occasion of publication is one of qualified privilege<sup>1</sup>. To defeat that defence the plaintiff<sup>2</sup> must then prove that the defendant, in publishing the words complained of, was actuated by express malice<sup>3</sup>.

1 As to the defence of qualified privilege see PARA 109 ante.

2 *Jenoure v Delmege* [1891] AC 73, PC, following *Clark v Molyneux* (1877) 3 QBD 237, CA; *Hebditch v MacIlwaine* [1894] 2 QB 54 at 58, CA, per Lord Esher MR. See also *Wright v Woodgate* (1835) 2 Cr M & R 573 at 577; *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA; *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 529, CA, per Lopes LJ. Actual malice must be distinguished from malice in law: see PARA 149 post. See also *Capital and Counties Bank v George Henty & Sons* (1882) 7 App Cas 741 at 787, HL, per Lord Blackburn, criticised by Lord Esher MR in *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 169, CA (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); and see *Hackett v Tierney* [1952] IR 185.

3 As to the meaning of 'malice' see PARA 149 post. As to express malice generally see PARA 149 et seq post; and as to its particular application to qualified privilege see PARA 153 et seq post.

## **UPDATE**

### **110 Effect of malice**

NOTE 3--A plaintiff's plea that malice defeats a defendant's qualified privilege will be unlikely to succeed if the defendant can show that he intended another honestly held meaning: *Loveless v Earl* [1999] EMLR 530, CA. See also *Halford v Chief Constable of Hampshire Constabulary* [2003] EWCA Civ 102, [2003] All ER (D) 167 (Feb).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(i) Introduction/111. Relevance of the defendant's belief.

### **111. Relevance of the defendant's belief.**

Neither the absence of malice nor the mere belief on the defendant's part that the occasion was privileged makes the occasion so<sup>1</sup>. Therefore, the question whether a defendant acted under a sense of duty, although important on the question of malice, is not relevant to the question whether the occasion was or was not privileged<sup>2</sup>, nor is a communication made on a privileged occasion merely because the person who makes it does so in the honest but mistaken belief that the person to whom the statement is made has an interest or duty to receive it, if in fact he has none<sup>3</sup>.

However, where in answer to an inquiry the person inquired of believes that the inquirer desires the information not merely to gratify idle curiosity, but for some purpose in which the inquirer has a legitimate interest of his own, the occasion upon which the answer is communicated to him is a privileged occasion<sup>4</sup>.

If the defendant publishes the words complained of in answer to criticisms which he knows at the time are in fact well-founded, no privilege will apply, either because the privilege does not arise at all, or because there is clear proof of malice<sup>5</sup>.

1 See *Hebditch v MacIlwaine* [1894] 2 QB 54, CA, criticising *Scarll v Dixon* (1864) 4 F & F 250, and other cases, and disapproving *Tompson v Dashwood* (1883) 11 QBD 43. The 'semble' in the headnote to *Harrison v Bush* (1856) 5 E & B 344, if justified by the report, is inconsistent with *Hebditch v MacIlwaine* supra at 61 per Lord Esher MR. See also *Coxhead v Richards* (1846) 2 CB 569 at 595 per Tindal CJ.

2 *Stuart v Bell* [1891] 2 QB 341 at 349, CA.

3 *Stuart v Bell* [1891] 2 QB 341, CA, where Lindley LJ criticised and explained the remarks of Jessel MR in *Waller v Loch* (1881) 7 QBD 619 at 621 (who is reported to have said that if the defendant in good faith thought that he was discharging a moral or social duty he would be protected), and stated that the observation, if intended to apply to privileged occasions, was not in accordance with other authorities. See also similar criticism by Lindley LJ in *Stuart v Bell* supra at 349 of passages in the judgments of *Pattison v Jones* (1828) 8 B & C 578, and the headnote in *Whiteley v Adams* (1863) 15 CBNS 392, which seems to go further than the judgments warrant. See also *Phelps v Kemsley* (1942) 168 LT 18 at 20, CA, per Goddard LJ.

4 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 35, HL, per Lord Atkinson and at 42 per Lord Parker. See also *Bromage v Prosser* (1825) 4 B & C 247.

5 *Fraser-Armstrong v Hadow* [1995] EMLR 140, CA. It is submitted that subjective intention is relevant to malice, not to the existence of privilege. Cf, in relation to fair comment, *Telnikoff v Matusevitch* [1992] 2 AC 343, [1991] 4 All ER 817, HL.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(i) Introduction/112. Relevance of the words used.

## 112. Relevance of the words used.

The defence of qualified privilege attaches to the occasion on which the words are published, rather than to the words themselves. It would be contrary to the purposes for which qualified privilege exists if the law applied an objective test of relevance to every part of the defamatory matter, as a precondition of the existence of privilege<sup>1</sup>. Words wholly unconnected with and irrelevant to the occasion may not be privileged<sup>2</sup>; but generally, irrelevant and unnecessary words having some relation to the occasion will be within the privilege but will constitute evidence of express malice<sup>3</sup>.

1 *Horrocks v Lowe* [1975] AC 135 at 151, [1974] 1 All ER 662 at 670, HL, per Lord Diplock.

2 *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 170, CA, per Lord Esher MR (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); approved in *Adam v Ward* [1917] AC 309 at 327, HL, per Lord Dunedin.

3 *Horrocks v Lowe* [1975] AC 135 at 151, [1974] 1 All ER 662 at 670, HL, per Lord Diplock.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/113. Correspondence of duty or interest.

## (ii) Communications to Limited Audience

### 113. Correspondence of duty or interest.

An occasion is privileged where the person who makes a communication has an interest<sup>1</sup> or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest<sup>2</sup> or duty to receive it<sup>3</sup>. The privilege extends only to a communication upon the subject with respect to which privilege exists, and does not extend to matters wholly irrelevant to and unconnected with the discharge of the duty, or the exercise of the right, or the safeguarding of the interest, which creates the privilege<sup>4</sup>.

Examples of privileged statements are statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them, statements made for the protection or furtherance of an interest to a person who has a common or corresponding interest to receive them, statements made in protection of a common interest, and statements made in answer to inquiries.

1 As to interest generally see *Shipley v Todhunter* (1836) 7 C & P 680 (mutual interest); *Wilson v Robinson* (1845) 7 QB 68 (statement by one part owner to another as to conduct of master of ship); *M'Dougall v Claridge* (1808) 1 Camp 267 (mutual interest); *Simmonds v Dunne* (1871) IR 5 CL 358 (interest must be real and legitimate).

2 As to the recipient's interest see *Blagg v Sturt* (1846) 10 QB 899 (letter to Secretary of State having no direct authority in respect of subject matter not privileged); affd sub nom *Sturt v Blagg* (1847) 10 QB 906, Ex Ch; cf *Harrison v Bush* (1856) 5 E & B 344 (where the Secretary of State was the proper person to whom to apply). As to cases where the communication was not made to proper persons see *Simpson v Downs* (1867) 16 LT 391 (to newspaper instead of to town council); *Sevenoaks v Latimer* (1919) 54 ILT 11; cf *Lawless v Anglo-Egyptian Cotton Co* (1869) LR 4 QB 262 (statement by director to shareholders).

3 This definition was laid down by Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334, HL, and followed in *Watt v Longsdon* [1930] 1 KB 130, CA, where it was held not sufficient to constitute privilege that the recipient of the communication had an interest in receiving it, if the person making the communication had no interest in making it or no duty to make it. See also *White v J and F Stone (Lighting and Radio) Ltd* [1939] 2 KB 827, [1939] 3 All ER 507, CA (the words in the definition 'the person to whom it is made' refer to a third person other than the plaintiff), criticising the decision in *Toogood v Spyring* (1834) 1 Cr M & R 181. See also *Harrison v Bush* (1856) 5 E & B 344 at 348-349; *Moore v Canadian Pacific SS Co* [1945] 1 All ER 128 (entry in ship's log book pursuant to statute of the supposed 'desertion' of a seaman); *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 528, CA; *Andrews v Nott Bower* [1895] 1 QB 888, CA; *Waller v Loch* (1881) 7 QBD 619. The real difficulty is in defining what kind of social or moral duty, or what amount of interest, will make the occasion privileged: *Whiteley v Adams* (1863) 15 CBNS 392 at 418 per Erle CJ; *Watt v Longsdon* [1930] 1 KB 130 at 139, 144, CA, per Scrutton LJ and at 153 per Greer LJ. See also *Beach v Freeson* [1972] 1 QB 14 at 24, [1971] 2 All ER 854 per Lake J. As to statements at elections see PARA 115 post.

4 *Adam v Ward* [1917] AC 309, HL; *M'Keogh v O'Brien Moran* [1927] IR 348; *Warren v Warren* (1834) 1 Cr M & R 250. The interest or duty must exist at the time of publication: *Ley v Hamilton* (1935) 153 LT 384, HL. See further *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL; and PARA 112 ante.

## UPDATE

### 113 Correspondence of duty or interest

NOTES--As to the test to be applied in establishing whether the defence of qualified privilege is available, see *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, HL, applied in *James Gilbert Ltd v MGN Ltd* [2000] EMLR 680. As to the relevance of the duty to import information, in the interest of the freedom of expression, when considering a plea of qualified privilege see *Baldwin v Rusbridger* [2001] EMLR 1062.

NOTE 1--See also *S v Newham LBC* [1998] 1 FLR 1061, CA (defence available to a local authority which, in accordance with ministerial guidelines, sent details concerning one of its social workers, to the Department of Health for inclusion in an index of persons unsuitable for child care work); *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2001] 2 All ER 437 (defence not available to a newspaper which published articles alleging football match fixing); *Kearns v General Council of the Bar* [2003] EWCA Civ 331, [2003] 2 All ER 534 (defence available to Bar Council communicating with members of the Bar); *W v JH* [2008] EWHC 399 (QB), [2009] EMLR 200 (defence available to local authority which forwarded details about claims of sexual harassment made against a social worker); *Clift v Slough BC* [2009] EWHC 1550 (QB), [2009] 4 All ER 756, [2010] EMLR 73 (defence available to local authority including a person in its violent persons register, but not extending to publication to employees in departments of the authority that the person was unlikely to approach).

NOTE 3--Communications made in the course of a child protection conference attract qualified privilege: *W v Westminster CC* [2004] EWHC 2866 (QB), [2005] 1 FLR 816.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/114. Statements as to employees' characters.

#### **114. Statements as to employees' characters.**

Statements made by employers as to employees' characters, even if untrue, are protected by qualified privilege<sup>1</sup>. The privilege not only attaches to communications made to persons who are thinking of engaging the employee<sup>2</sup> or have already taken him into their employ<sup>3</sup>, but extends also to communications made to his previous employers<sup>4</sup> or to the employment agency through which he may have been engaged<sup>5</sup>. Statements made to other persons are not privileged<sup>6</sup> unless it appears from the circumstances in which they were made that the employer and the person to whom they were made had a common interest in the subject matter of the statement<sup>7</sup>. Thus, the employer is entitled to inform his other employees<sup>8</sup>, or his customers with whom his employee has been in the habit of dealing<sup>9</sup>, that the employee is no longer in his employment. However, it does not necessarily follow that a statement of the reasons for the employee being no longer employed would be equally privileged. To be privileged, such a statement must be made to a person such as a fellow employee<sup>10</sup> or, where the employer is a company, to a shareholder of the company<sup>11</sup>, or to any person, such as the parent or other person in loco parentis of a young employee<sup>12</sup>, who had an interest not merely in the fact of the employee ceasing to be employed, but also in the reasons for it.

It is not necessary that the communication should be made by the employer whose service the employee defamed is leaving. The privilege equally extends to a communication made to his present employer by a fellow employee<sup>13</sup> or a former employer<sup>14</sup>, or even, where the facts are not inconsistent with its existence, by a stranger<sup>15</sup>.

The employer is protected whether the statement is spoken or written<sup>16</sup>. The statement may be made in answer to inquiries<sup>17</sup>, or may be volunteered<sup>18</sup>; and even where the employer conducts himself so as to invite inquiries in answer to which he makes the defamatory statement, the privilege is not necessarily lost<sup>19</sup>. However, whereas an answer given to an inquiry made by a

would-be employer<sup>20</sup> is clearly within the privilege, the fact that, in the absence of sufficient justification, the employer invited the inquiry may be evidence of malice<sup>21</sup>. At the same time, the employer is entitled to correct any statement which may have been made as to his employee's character if he subsequently discovers facts which he did not already know<sup>22</sup>. The privilege extends to statements as to conduct after the employee has left his employ<sup>23</sup>.

The protection of qualified privilege, with the consequent obligation on the plaintiff to prove express malice, will not apply if the action upon the misleading reference is framed in negligence instead of defamation<sup>24</sup>.

1 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 528, CA; *Harris v Thompson* (1853) 13 CB 333; *R v Perry* (1883) 15 Cox CC 169. However, the privilege will be defeated where the plaintiff proves express or actual malice against the defendant: see *Fountain v Boodle* (1842) 3 QB 5; *Fryer v Kinnersley* (1863) 15 CBNS 422; *Pattison v Jones* (1828) 8 B & C 578; *Kelly v Partington* (1833) 4 B & Ad 700; *Jackson v Hopperton* (1864) 16 CBNS 829; *Murdoch v Funduklian* (1886) 2 TLR 614, CA; *Hayford v Forrester-Paton* 1927 SC 740.

2 *Fountain v Boodle* (1842) 3 QB 5.

3 *Gardner v Slade* (1849) 13 QB 796; *Webb v East* (1880) 5 Ex D 108, CA.

4 *Dixon v Parsons* (1858) 1 F & F 24. Where the employee is in the employment of two employers at the same time, a communication from one to the other is privileged: *Harris v Thompson* (1853) 13 CB 333.

5 *Farquhar v Neish* (1890) 17 R 716, Ct of Sess.

6 Cf *Cox v Mathews* (1861) 2 F & F 397.

7 *Taylor v Hawkins* (1851) 16 QB 308; *Jones v Thomas* (1885) 53 LT 678, DC; cf *Johnson v Evans* (1799) 3 Esp 33; *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 per Parke B; and see PARA 113 ante.

8 *Hunt v Great Northern Rly Co* [1891] 2 QB 189, CA; *Somerville v Hawkins* (1851) 10 CB 583; *AB v XY* 1917 SC 15.

9 *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156, CA (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL).

10 *Hunt v Great Northern Rly Co* [1891] 2 QB 189, CA; *Somerville v Hawkins* (1851) 10 CB 583; cf *Manby v Witt* (1856) 18 CB 544.

11 *Lawless v Anglo-Egyptian Cotton Co* (1869) LR 4 QB 262; *Hamon v Falle* (1879) 4 App Cas 247, PC; cf *Stott v Evans* (1887) 3 TLR 693, DC.

12 *Cox v Mathews* (1861) 2 F & F 397; *Aberdeen v Macleay* (1893) 9 TLR 539.

13 *Mead v Hughes* (1891) 7 TLR 291 (statement by one servant as to character of another in answer to inquiries of employer); *Cochrane v Young* 1922 SC 696 (complaint by staff concerning secretary read to pensions committee and officials by chairman).

14 *Dixon v Parsons* (1858) 1 F & F 24.

15 *Stuart v Bell* [1891] 2 QB 341, CA; *Baird v Wallace-James* (1916) 85 LJPC 193, HL (communication by president of charitable association to chairman of parish council regarding conduct of medical officer); cf *Amann v Damm* (1860) 8 CBNS 597.

16 *Edmondson v Stephenson* (1766) Bull NP 8.

17 *Weatherston v Hawkins* (1786) 1 Term Rep 110; *Child v Affleck* (1829) 9 B & C 403.

18 *Pattison v Jones* (1828) 8 B & C 578; cf *Stuart v Bell* [1891] 2 QB 341, CA.

19 *Harris v Thompson* (1853) 13 CB 333; *Pattison v Jones* (1828) 8 B & C 578.

20 *Child v Affleck* (1829) 9 B & G 403.



21 *Pattison v Jones* (1828) 8 B & C 578; *Fountain v Boodle* (1842) 3 QB 5; and see PARA 111 ante. Whether or not it constitutes proof of malice is for the jury to decide.

22 *Gardner v Slade* (1849) 13 QB 796; *Child v Affleck* (1829) 9 B & C 403.

23 *Child v Affleck* (1829) 9 B & C 403.

24 *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL. It is uncertain what further publications, protected by qualified privilege in defamation, will be held subject to a duty of care in negligence.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/115. Statements at elections.

### **115. Statements at elections.**

A defamatory statement published by or on behalf of a candidate in any local government or parliamentary election is not deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the publisher is qualified to vote at the election<sup>1</sup>. Defamatory statements otherwise made<sup>2</sup> by any person, such as an elector, are privileged if they are made to the electors and are relevant to the matters which the electors must consider in deciding which way to vote<sup>3</sup>.

1 Defamation Act 1952 s 10, overruling in this respect *Braddock v Bevins* [1948] 1 KB 580, [1948] 1 All ER 450, CA, except, perhaps, in the most exceptional circumstances: see *Plummer v Charman* [1962] 3 All ER 823 at 826, [1962] 1 WLR 1469 at 1472, CA, per Lord Denning MR.

2 As to the illegal practice of knowingly publishing false statements as to a candidate at an election and as to restraining such statements by injunction see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARAS 669, 683.

3 *Braddock v Bevins* [1948] 1 KB 580 at 590, [1948] 1 All ER 450 at 453, CA; *Harwood v Astley* (1804) 1 Bos & PNR 47 (where the defendant had no claim to qualified privilege); *Pankhurst v Hamilton* (1887) 3 TLR 500 (qualified privilege defeated by malice); *Duncombe v Daniell* (1837) 8 C & P 222 (publication not only to the electors but to all the world not privileged); *Anderson v Hunter* (1891) 18 R 467, Ct of Sess (defendant not a candidate or an elector; not privileged); *Bruce v Leisk* (1892) 29 SLR 412 (communication by one elector to another privileged); but see note 1 supra.

### **UPDATE**

#### **115 Statements at elections**

TEXT AND NOTE 1--These provisions also apply to National Assembly for Wales elections: 1952 Act s 10 (amended by the Government of Wales Act 2006 Sch 10 para 5). As to the National Assembly for Wales generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

See *Culnane v Morris* [2005] EWHC 2438 (QB), [2006] 2 All ER 149 (election candidate not precluded from relying on defence of qualified privilege).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/116. Trade protection societies and credit reference agencies.

### **116. Trade protection societies and credit reference agencies.**

Inquiries, reports and references made with regard to the commercial credit of a person with whom a trader proposes to transact business may be entitled to qualified privilege<sup>1</sup> provided that the agency or society is non-profit-making<sup>2</sup>. The trader may make inquiries through an agent for that purpose, and the agent's report will be privileged<sup>3</sup>; but a commercial credit reference agency, operating for profit and with its records open to those who care to pay, has been held to operate at its own risk and without the protection of qualified privilege<sup>4</sup>.

1 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, HL; see especially at 42 per Lord Parker, who doubted the validity of the decision in *Macintosh v Dun* [1908] AC 390, PC, where an association conducted for profit by people themselves wholly unconnected with trade acquired information for reward to subscribers; as the communications were not made in discharge of either a public or private duty they were held to be not published on a privileged occasion. The case was also doubted in *Watt v Longsdon* [1930] 1 KB 130 at 148, CA, per Scott LJ. See also *Elkington v London Association for Protection of Trade* (1911) 28 TLR 117 (occasion not privileged); *Greenlands Ltd v Wilmschurst and London Association for Protection of Trade* [1913] 3 KB 507 at 543, CA, per Hamilton LJ.

2 *Macintosh v Dun* [1908] AC 390, PC. This decision has, however, been doubted: see note 1 supra.

3 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, HL.

4 *Macintosh v Dun* [1908] AC 390, PC; and see the *Report of the Committee on Data Protection* (Cmnd 7341) (1978) PARAS 32.11-32.16. As to data protection see generally CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 503 et seq.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/117. Other occasions of qualified privilege.

### 117. Other occasions of qualified privilege.

Other examples of limited communications which have been held protected by qualified privilege include:

- 55 (1) statements made at committees and council meetings<sup>1</sup>;
- 56 (2) agenda of certain public meetings<sup>2</sup>;
- 57 (3) communications by a solicitor on his client's behalf<sup>3</sup>;
- 58 (4) statements made in the protection of a person's own interests<sup>4</sup>;
- 59 (5) statements made during the investigation of crime<sup>5</sup>;
- 60 (6) communications on family or private matters<sup>6</sup>,

and many other instances of the application of the general principles set out above<sup>7</sup>.

1 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA (qualified privilege of statement of county councillors at meeting for granting music and dancing licences); *Pittard v Oliver* [1891] 1 QB 474, CA (presence of reporters at meeting of poor law guardians not sufficient to take away privilege of occasion) (distinguishing *Purcell v Sowler* (1877) 2 C PD 215, CA); *Mapey v Baker* (1909) 73 JP 289, CA (speech by member of board of guardians at board meeting as to collection of poor rate in parish within his union privileged). As to the statutory protection of reports of public meetings see the Defamation Act 1996 s 15, Sch 1 paras 11, 12; and PARA 133 post. At the date at which this volume states the law, s 15, Sch 1 had not been brought into force.

2 When an agenda is supplied to a member of the public at a meeting as required by the Public Bodies (Admission to Meetings) Act 1960, the publication in it of any defamatory matter is protected by qualified

privilege: see s 1(5). Supply of the agenda to a newspaper pursuant to s 1(4)(b) is similarly protected: s 1(5). See further LOCAL GOVERNMENT vol 69 (2009) PARA 641 et seq.

3 *Baker v Carrick* [1894] 1 QB 838, CA (letters by solicitor in course of duty to his client written to protect client's interest privileged where occasion would have been privileged had letter been written by the client); approving *Blackham v Pugh* (1846) 2 CB 611 (notice by plaintiff's creditor to auctioneer not to pay proceeds of sale to plaintiff, alleging act of bankruptcy by plaintiff); *Browne v Dunn* (1893) 6 R 67, HL (letter by solicitor to client leading up to retainer). As to communications between solicitor and client see PARA 99 note 4 ante.

4 *Coward v Wellington* (1836) 7 C & P 531; *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495 (charge of bishop to clergy; bishop there justified in defending himself by sending that charge to the newspaper); *Towell v Fallon* (1913) 47 ILT 176; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 470-471, HL.

5 *Force v Warren* (1864) 15 CBNS 806 (as to what statements by a person suspecting another of theft are or are not privileged); cf *Harrison v Fraser* (1881) 29 WR 652. 'For the sake of public justice, charges and communications which would otherwise be slanderous are protected if bona fide made in the prosecution of an inquiry into a suspected crime': *Padmore v Lawrence* (1840) 11 Ad & El 380 at 382 per Coleridge J. See also *Collins v Cooper* (1902) 19 TLR 118 at 119, CA ('all material statements made by the persons interested in the detection of a crime, during their investigations and material thereto, are privileged'); *Stuart v Bell* [1891] 2 QB 341, CA (statement by the defendant to the plaintiff's employee that there had been a theft and that suspicion had fallen on the plaintiff was made on a privileged occasion, and in the absence of evidence of malice the defendant was not liable).

6 *Todd v Hawkins* (1837) 2 Mood & R 20 (advice by relative as to matters of family interest privileged); and see *Whiteley v Adams* (1863) 15 CBNS 392 at 418; *Bennett v Deacon* (1846) 2 CB 628; *Stuart v Bell* [1891] 2 QB 341, CA; *Jenoure v Delmege* [1891] AC 73, PC (fact that statement is volunteered does not, if the occasion is privileged, throw on the defendant the burden of proving good faith). As to the danger of voluntary statements see *Toogood v Spyring* (1834) 1 Cr M & R 181; *Dickeson v Hilliard* (1874) LR 9 Exch 79.

7 As to those general principles see PARA 109 ante. There are many other instances in the cases: see eg *Clark v Molyneux* (1877) 3 QBD 237, CA (communications between incumbent and curate as to ecclesiastical matters; observations as to what is and is not express malice); *Hamon v Falle* (1879) 4 App Cas 247, PC (statement by proposed insurers of ship to insured privileged); *Hackett v Tierney* [1952] IR 185 (statement by university president to bursar accusing student of false pretences privileged); *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA (obiter dictum that complaint against barrister made to Bar Council probably protected by qualified privilege); *Beach v Freeson* [1972] 1 QB 14, [1971] 2 All ER 854 (complaint to Law Society and Lord Chancellor about firm of solicitors by a member of Parliament on behalf of a constituent privileged); *Adam v Ward* [1917] AC 309, HL (communication by secretary of Army Council to general vindicating him against a charge made by the plaintiff in the House of Commons privileged); *R v Rule* [1937] 2 KB 375, [1937] 2 All ER 772, CCA (communication by a constituent to a member of Parliament on improper conduct of official privileged); *De Buse v McCarthy* [1942] 1 KB 156, [1942] 1 All ER 19, CA (publication to ratepayers of a committee's report to a borough council not privileged); *Roff v British and French Chemical Manufacturing Co and Gibson* [1918] 2 KB 677, CA (communication by one party to proposed arbitration to the other party objecting to suggested arbitrator privileged); *Gerhold v Baker* (1918) 35 TLR 102, CA (communication to military representative in reply to letter from him regarding pending claim for exemption from military service privileged); *Winstanley v Bampton* [1943] KB 319, [1943] 1 All ER 661 (creditor's letter to commanding officer of debtor privileged); *Osborn v Thomas Boulter & Son* [1930] 2 KB 226, CA (complaint by licensee that beer supplied was bad; brewers' reply alleging that he had watered the beer privileged); *Szalatnay-Stacho v Fink* [1947] KB 1, [1946] 2 All ER 231, CA (letter of Czech prosecutor privileged); *Frank Smythson Ltd v GA Cramp & Sons Ltd* [1943] Ch 133, [1943] 1 All ER 322, CA (letter by alleged copyright owner to firms selling alleged infringing copies giving warning of proceedings privileged); *Davis v London Express Newspaper Ltd* (1938) 55 TLR 207 (inquiry into company finance privileged); *Angell v HH Bushell & Co Ltd* [1968] 1 QB 813, [1967] 1 All ER 1018 (communication by defendant stating to the third party who had introduced him to the plaintiff the reasons for ending business relations with the plaintiff privileged); *Campbell v Cochrane* (1906) 8 F 205, Ct of Sess (statements in reply to threat of action and relevant to it privileged); *Keith v Lauder* (1905) 8 F 356, Ct of Sess (report by a member of association of fishing boat owners for, insertion by the secretary in the 'defaulters' register' of alleged misconduct of an engineer privileged); *Allbutt v General Council of Medical Education and Registration* (1889) 23 QBD 400, CA (report of meeting at which medical practitioner was removed from register privileged); *Phelps v Kemsley* (1942) 168 LT 18, CA (employer's communication to employee's doctor as to state of mind privileged); *Bridgman v Stockdale* [1953] 1 All ER 1166, [1953] 1 WLR 704 (invigilator's statement to examiners that plaintiff had cheated privileged); *Standen v South Essex Records Ltd* (1934) 50 TLR 365 (letter in newspaper commenting on proceedings at meeting of local authority not privileged); *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 2 All ER 701, [1982] 1 WLR 958, CA (communication between exchange and members about suspected fraudster held arguably privileged).

## UPDATE

## 117 Other occasions of qualified privilege

NOTE 1--1996 Act s 15, Sch 1 in force 1 April 1999: SI 1999/817.

NOTE 3--See also *Regan v Taylor* [2000] EMLR 549, CA (statements made to the press by a solicitor, attacking a person who has attacked his client, are covered by qualified privilege notwithstanding that they have not been expressly authorised by the client).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/118. Protection of publications incidental to privileged communications.

## 118. Protection of publications incidental to privileged communications.

A person may take all reasonable steps to make a privileged communication to another, which may include publication to other persons in the ordinary course of business<sup>1</sup>. For instance, it is a reasonable and usual course to dictate business letters to a typist, even if those letters may contain defamatory statements<sup>2</sup> and it may also be reasonable to send a defamatory letter which is likely to be opened by the addressee's secretary. In such cases, an 'ancillary' qualified privilege is said to apply. The doctrine also covers publication to the defendant's typist or the plaintiff's secretary of defamatory communications about the plaintiff himself, which are non-actionable rather than privileged.

1 *Edmondson v Birch & Co Ltd and Horner* [1907] 1 KB 371 at 380, CA, per Collins MR, and at 382 per Cozens-Hardy and Fletcher Moulton LJ; *Osborn v Thomas Boulter & Son* [1930] 2 KB 226 at 284, CA, where the privilege attaching to the main communication was held to cover all the incidents of transmission of other communications in accordance with the reasonable and usual course of business. Cf *Bryanston Finance Ltd v de Vries* [1975] QB 703 at 719, [1975] 2 All ER 609 at 616, CA, per Lord Denning MR, in a minority judgment (the privilege protecting publication to a typist is original and not ancillary to the privileged publication to the addressees of the letter dictated). See also *Riddick v Thames Board Mills* [1977] QB 881, [1977] 3 All ER 677, CA (inter-office memorandum privileged).

2 *Osborn v Thomas Boulter & Son* [1930] 2 KB 226, CA; *Bryanston Finance Ltd v de Vries* [1975] QB 703, [1975] 2 All ER 609, CA; and see *Roff v British and French Chemical Manufacturing Co and Gibson* [1918] 2 KB 677, CA; *M Isaacs & Sons Ltd v Cook* [1925] 2 KB 391 at 399-400 per Roche J. In *Edmondson v Birch & Co Ltd and Horner* [1907] 1 KB 371, CA (in which *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, CA, was distinguished, and *Boxsius v Goblet Frères* [1894] 1 QB 842, CA, and *Lawless v Anglo-Egyptian Cotton Co* (1869) LR 4 QB 262, were followed), the course followed in making the communication was the reasonable and usual course to adopt in the circumstances: see PARA 62 ante. In *Boxsius v Goblet Frères* supra a solicitor instructed to write a defamatory letter on a privileged occasion on behalf of a client was held to be entitled to do so in the ordinary way of office routine, which involved having the communication taken down by a clerk, and copied into the letter book. In *Lawless v Anglo-Egyptian Cotton Co* supra it was held that a company, in making known to its shareholders matter proper for them to know, may employ a printer, in the usual course, to print the report. Others may do likewise, provided that the means adopted are necessary, having regard to the facts of the particular case and the exigencies of business: *Lawless v Anglo-Egyptian Cotton Co* supra; and see at 269-270 per Hannen J. The transmission of libellous matter unnecessarily by telegram was held to have destroyed the privilege: see *Williamson v Freer* (1874) LR 9 CP 393; cf *Edmondson v Birch & Co Ltd and Horner* [1907] 1 KB 371 at 381, CA. As to transmission by postcard where the plaintiff's name is not disclosed see *Sadgrove v Hole* [1901] 2 KB 1, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/119. The presence of third persons in relation to slander.

## 119. The presence of third persons in relation to slander.

In actions for slander the presence of a third person on a privileged occasion does not necessarily avoid the privilege although it may be evidence of actual malice if the defamatory statement could have been made in private<sup>1</sup>. However, where the presence of the third person is reasonably necessary for the protection of the defendant's interests, and he is not unfairly selected, his presence, although secured by the defendant, is no evidence of actual malice<sup>2</sup>.

1 See *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193-194 per Parke B. Business communications are not to be beset with actions of slander: *Dunman v Bigg* (1808) 1 Camp 269n per Lord Ellenborough CJ, cited with approval in *Taylor v Hawkins* (1851) 16 QB 308 at 322 per Lord Campbell CJ. See also *Pittard v Oliver* [1891] 1 QB 474, CA, where the occasion was privileged notwithstanding the presence of reporters or persons other than guardians at the meeting of a board of guardians; and see at 477-478 per Lord Esher MR as to what the position would have been had the defendant called third persons into the meeting, and at 479 (criticism of *Purcell v Sowler* (1877) 2 CPD 215, CA).

2 *Taylor v Hawkins* (1851) 16 QB 308; cf *Somerville v Hawkins* (1851) 10 CB 583; and see *Toogood v Spyring* (1834) 1 Cr M & R 181; *Padmore v Lawrence* (1840) 11 Ad & El 380; *Parsons v Surgey* (1864) 4 F & F 247; *Davies v Snead* (1870) LR 5 QB 608; *Jones v Thomas* (1885) 53 LT 678, DC; *Pittard v Oliver* [1891] 1 QB 474, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(ii) Communications to Limited Audience/120. Answers to questions by the plaintiff in presence of third persons.

### **120. Answers to questions by the plaintiff in presence of third persons.**

A statement by the defendant to the plaintiff, although uttered in the presence of third persons, is a statement made on a privileged occasion if and in so far as it is an answer to a question put by the plaintiff<sup>1</sup>. Such a statement may also be protected by the defence of leave and licence<sup>2</sup>. However, in so far as the reply is not an answer to the question it is not made on a privileged occasion, and, unless the occasion is otherwise privileged, there is no need for the plaintiff to prove the existence of actual malice<sup>3</sup>.

1 *Warr v Jolly* (1834) 6 C & P 497, considered in *Griffiths v Lewis* (1845) 7 QB 61 at 67; cf *Palmer v Hummerston* (1883) Cab & El 36.

2 See PARA 166 post.

3 See *Griffiths v Lewis* (1845) 7 QB 61; *Smith v Mathews* (1831) 1 Mood & R 151. An answer to an inquiry by a company as to a transfer is privileged: *Hesketh v Brindle* (1888) 4 TLR 199, DC. In *Davies v Snead* (1870) LR 5 QB 608, a statement as to the administration of a trust by A and B, two trustees, made on an occasion privileged as to A, was held to be made on an occasion privileged as to B also, since the statement concerning A could not be made without referring also to B.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iii) Communications to the Public Generally/121. Qualified privilege for communications to the press and public.

### **(iii) Communications to the Public Generally**

#### **121. Qualified privilege for communications to the press and public.**

The common law principle that qualified privilege attaches to a communication made between parties who share a common and corresponding interest in the subject, or to one made pursuant to a duty to a person having a corresponding duty to receive, or interest in receiving, it, applies to communications to the public at large, as well as to communications to a limited class<sup>1</sup>. The courts have, however, applied a strict test of interest and duty in such cases and have, in particular, declined to recognise a duty or interest on the part of the press itself save in very clear cases<sup>2</sup>.

1 As to the general principle see PARA 113 ante.

2 See *Blackshaw v Lord* [1984] QB 1, [1983] 2 All ER 311, CA; and PARAS 122-124 post.

## UPDATE

### 121 Qualified privilege for communications to the press and public

TEXT AND NOTES--In deciding whether qualified privilege attaches to a publication, the court must ask itself the single question whether the test of interest and duty has been satisfied, the interest being that of the public in a modern democracy in free expression and the corresponding duty being on the journalist to play his proper role in discharging that function: *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2001] All ER (D) 44 (Dec). The New Zealand courts have held that the protection of qualified privilege should apply to claims for damages for defamation arising from political discussion: *Lange v Atkinson* [1997] 2 NZLR 22.

NOTE 1--As to the requirement for a defendant pleading qualified privilege to have knowledge of the facts he relies on to justify that defence at the time of publication, see *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 536, [2001] 3 WLR 404. See also *Flood v Times Newspapers Ltd* [2009] EWHC 2375 (QB), [2010] EMLR 169 (article stating that public servant subject of police investigation fell within defence of qualified privilege).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iii) Communications to the Public Generally/122. Reply to attack.

### 122. Reply to attack.

The clearest instance of a qualified privilege attaching to communications to the public at large is that of reply to a public criticism or attack. The person criticised has a sufficient common interest with the readers to confer privilege upon his reply to the same or substantially the same audience<sup>1</sup>. The attack may give rise to a duty upon others to reply on the victim's behalf<sup>2</sup> and to an ancillary privilege in the newspaper or other medium publishing the reply, especially if it carried the original attack<sup>3</sup>.

1 See *Adam v Ward* [1917] AC 309, HL; *London Artists Ltd v Littler* [1968] 1 All ER 1075, [1968] 1 WLR 607 (on appeal [1969] 2 QB 375, [1969] 2 All ER 193, CA).

2 See eg *Adam v Ward* [1917] AC 309, HL (secretary of the Army Council held entitled to reply in defence of an army officer who had been attacked in Parliament).

3 See *Watts v Times Newspapers Ltd* [1996] 1 All ER 152, [1996] 2 WLR 427, CA, in which it was emphasised that in such cases each defendant's position falls to be considered separately, so that an apology in a

newspaper, defamatory of a third party, was privileged in relation to the person apologised to, but not, on the facts, so far as the newspaper was concerned.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iii) Communications to the Public Generally/123. Public interest alone not sufficient.

### **123. Public interest alone not sufficient.**

Except in the case of a reply to an attack<sup>1</sup>, the fact that a matter is of legitimate public interest is not sufficient to give rise to a qualified privilege at common law for publication to the world at large. There must be a duty on the publisher to publish the words, as well as an interest in the public to read them<sup>2</sup>. Such a duty on the press might arise in the case of an official report on a matter of public interest, or of pressing concern about a terrorist or about contaminated food and drugs; but not when the matter merely concerned suspicions or allegations or was under investigation<sup>3</sup>. There is no general common law privilege of fair information as a matter of public interest<sup>4</sup> or in relation to allegations concerning public figures<sup>5</sup>.

1 See PARA 122 ante.

2 *Blackshaw v Lord* [1984] QB 1, [1983] 2 All ER 311, CA.

3 *Blackshaw v Lord* [1984] QB 1 at 26-27, [1983] 2 All ER 311 at 327, CA, per Stephenson LJ. Most official warnings on such matters would also be the subject of statutory qualified privilege under the Defamation Act 1996 s 15, Sch 1: see PARA 132 post. At the date at which this volume states the law, s 15, Sch 1 had not been brought into force.

4 Obiter dicta to that effect in *Webb v Times Publishing* [1960] 2 QB 535, [1960] 2 All ER 789 were expressly disapproved in *Blackshaw v Lord* [1984] QB 1 at 26, [1983] 2 All ER 311 at 327, CA.

5 The law of the United States in effect recognises such a privilege by requiring proof of express malice in actions concerning public figures (see *New York Times Co v Sullivan* 376 US 254 (1964)) but, except where there is a duty to publish, no such privilege or principle is recognised in English law. Cf *Langlands v Leng & Co Ltd* 1916 SC 102, HL.

### **UPDATE**

#### **123 Public interest alone not sufficient**

NOTE 2--See *Lukowiak v Unidad Editorial SA* [2001] EMLR 1043 (publication with international dimension; necessary to consider dimension when determining duty). See also *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] All ER (D) 178 (Jan); and *Roberts v Gable* [2007] EWCA Civ 721, [2007] EMLR 457 (defendants published allegations of a feud between two active members of a political party).

NOTES 3, 4--If the public interest is engaged, a publication is privileged if it satisfies the test of responsible journalism, which is that the defendant has behaved fairly and responsibly in gathering and publishing the information: see *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750.

NOTE 3--1996 Act s 15, Sch 1 in force 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iii) Communications to the Public Generally/124. Publication to a section of the public sufficient.

#### **124. Publication to a section of the public sufficient.**

In many cases, the requirements of duty and interest will be met by publication to a section of the public only and qualified privilege will not attach to publication more widely to the public at large<sup>1</sup>.

<sup>1</sup> See *Chapman v Lord Ellesmere* [1932] 2 KB 431, CA (findings of the Jockey Club privileged if published in the Racing Calendar but not in a national newspaper). Note that publication of reports of the findings of sporting disciplinary bodies are now to be privileged by statute: see the Defamation Act 1996 s 15, Sch 1 para 14(c) (replacing similar provisions in the Defamation Act 1952); and PARA 133 post. At the date at which this volume states the law, the Defamation Act 1996 s 15, Sch 1 had not been brought into force.

#### **UPDATE**

#### **124 Publication to a section of the public sufficient**

NOTE 1--1996 Act s 15, Sch 1 in force 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/A. THE NATURE OF THE PRIVILEGE/125. Privileged reports of public proceedings.

#### **(iv) Privileged Reports**

#### **A. THE NATURE OF THE PRIVILEGE**

#### **125. Privileged reports of public proceedings.**

On similar principles to those underlying the general defence of qualified privilege, the common law recognises that it is in the public interest, and for the common convenience and welfare of society, that the public should be informed of the proceedings of the courts, Parliament, and other public bodies<sup>1</sup>. The effect of the privilege is that defamatory allegations, initially made in such places, may be reported outside them; provided the report is fair and accurate, the reporter is not liable for the repetition of the defamation in the absence of proof of malice on his part<sup>2</sup>.

The common law privilege only covers proceedings to which the public would have admittance, not those from which they are excluded, or reporting of which has been expressly forbidden by statute or by order of court or Parliament<sup>3</sup>. Nor will it cover material that is blasphemous, seditious or obscene or otherwise not for the public benefit<sup>4</sup>.

<sup>1</sup> *Perera v Peiris* [1949] AC 1, PC; *Macintosh v Dun* [1908] AC 390, PC; *MacDougall v Knight* (1889) 14 App Cas 194 at 200, HL, per Lord Halsbury LC.

<sup>2</sup> See *Kimber v Press Association Ltd* [1893] 1 QB 65, CA.

<sup>3</sup> *Scott v Scott* [1913] AC 417 at 452, HL, per Lord Atkinson; *Chapman v Lord Ellesmere* [1932] 2 KB 431 at 475, CA, per Romer LJ.



4 *Steele v Brannan* (1872) LR 7 CP 261.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/A. THE NATURE OF THE PRIVILEGE/126. Effect of statutes.

## **126. Effect of statutes.**

The common law doctrine of privileged reports has been largely modified and superseded by statute. Reports of court proceedings, certain parliamentary papers and documents, and the proceedings of certain tribunals and public officials enjoy statutory absolute privilege<sup>1</sup>.

The reporting of certain aspects of judicial proceedings such as indecent matter, and of matrimonial and domestic proceedings, preliminary hearings, and proceedings in relation to children and young persons, is prohibited or restricted by statute<sup>2</sup>. There is also a statutory restriction on the reporting of certain derogatory assertions made in criminal proceedings<sup>3</sup>.

Most importantly, a statutory qualified privilege now attaches to reports of many public proceedings, including courts and legislatures anywhere in the world<sup>4</sup>. This statutory privilege will often render consideration of the common law unnecessary, though it remains relevant to interpretation of the statutes, and can extend privilege to reports of matters outside the statutory occasion but having a sufficient connection with it<sup>5</sup>. The common law doctrine of privileged reports is not limited or abridged by the Defamation Act 1996<sup>6</sup>.

1 See PARA 98 et seq ante.

2 See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1271-1276; CRIMINAL LAW, EVIDENCE AND PROCEDURE; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 1015; PRESS, PRINTING AND PUBLISHING vol 36(2) (Reissue) PARAS 434-437, 461. Qualified privilege will not attach to such unlawful publications: *Scott v Scott* [1913] AC 417 at 452, HL, per Lord Atkinson.

3 See PARAS 302-303 post.

4 See the Defamation Act 1996 s 15, Sch 1; and PARAS 132-133 post. At the date at which this volume states the law, s 15, Sch 1 had not been brought into force.

5 *Tsikata v Newspaper Publishing plc* [1997] 1 All ER 655, CA.

6 See the Defamation Act 1996 s 15(4)(b); and see note 4 supra.

## **UPDATE**

### **126 Effect of statutes**

NOTE 4--1996 Act s 15, Sch 1 in force 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/B. THE COMMON LAW PROTECTION/127. Judicial proceedings.

## **B. THE COMMON LAW PROTECTION**

## 127. Judicial proceedings.

Immunity attaches only to the report of actual legal proceedings<sup>1</sup>, and will not be applied to protect an unsworn defamatory statement made by a bystander, even if in open court, forming no part of the legal proceedings<sup>2</sup>.

The immunity extends<sup>3</sup> to reports of ex parte proceedings before magistrates<sup>4</sup> and to reports of public proceedings before a judge in chambers<sup>5</sup>, a coroner<sup>6</sup> or a registrar in bankruptcy<sup>7</sup>.

1 A report may properly record the observations of a litigant made in court and still under the obligation of an oath but out of the witness box: see *Hope v WC Leng & Co (Sheffield Telegraph) Ltd* (1907) 23 TLR 243, CA, per Collins MR. Cf *Delegal v Highley* (1837) 3 Bing NC 950 at 960-961 per Tindal CJ, where the observation of the chief clerk was treated as if it had been made by a mere bystander. An application to a judge by a person interrupting judicial proceedings is made in the course of proceedings and immunity attaches to the report: *Farmer v Hyde* [1937] 1 KB 728, [1937] 1 All ER 773, CA. A mistake in citing from law reports may lay an author open to an action for libel: see *Blake v Stevens* (1864) 4 F & F 232.

2 See *Lynam v Gowing* (1880) 6 LR Ir 259, where a plea which was in substance to the effect stated in the text was held bad on demurrer; *Delegal v Highley* (1837) 3 Bing NC 950 at 961 per Tindal CJ.

3 Is subject to the exceptions referred to in PARA 125 ante.

4 *Usill v Hales* (1878) 3 CPD 319; *Kimber v Press Association Ltd* [1893] 1 QB 65, CA.

5 *Smith v Scott* (1847) 2 Car & Kir 580. Chambers are not usually open to the public without leave of the judge. See also PARA 125 ante.

6 *Lynam v Gowing* (1880) 6 LR Ir 259.

7 *Ryalls v Leader* (1866) LR 1 Exch 296. As to absolute privilege see PARAS 94-108 ante.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/B. THE COMMON LAW PROTECTION/128. What constitutes a fair and accurate report.

## 128. What constitutes a fair and accurate report.

The report must be fair and impartial, although it need not be verbatim<sup>1</sup>, and should convey to its readers the substance of what has taken place in court as if they had been present, since this is the reason for the privilege<sup>2</sup>. A report in a daily newspaper should not be judged by the standards of professional law reporters<sup>3</sup>. A newspaper is under no obligation to verify the accuracy of statements made in the course of proceedings<sup>4</sup>.

The report of a portion only of the legal proceedings may in many cases detract from its fairness and accuracy<sup>5</sup>. Thus, it may be misleading to report the opening speech of counsel without the evidence on which it is founded<sup>6</sup>, or the evidence of a witness without the cross-examination<sup>7</sup>. However, it is not necessary as a matter of law that the report should be a report of the whole of the proceedings<sup>8</sup>. The publication of a report of a separate part of proceedings will be privileged if it is fair and accurate and published without malice<sup>9</sup>.

1 See *Hoare v Silverlock* (1850) 9 CB 20; *Lewis v Levy* (1858) EB & E 537; *Andrews v Chapman* (1853) 3 Car & Kir 286; *Turner v Sullivan* (1862) 6 LT 130. As to omissions see *Grimwade v Dicks* (1886) 2 TLR 627. As to omitting to intimate the result of proceedings see *Pope v Outram & Co Ltd* 1909 SC 230.

2 *Furniss v Cambridge Daily News Ltd* (1907) 23 TLR 705 at 706, CA; *Burnett and Hallamshire Fuel Ltd v Sheffield Telegraph and Star Ltd* [1960] 2 All ER 157, [1960] 1 WLR 502.

3 *Hope v WC Leng & Co (Sheffield Telegraph) Ltd* (1907) 23 TLR 243 at 244-245, CA.

4 See *Burnett and Hallamshire Fuel Ltd v Sheffield Telegraph and Star Ltd* [1960] 2 All ER 157, [1960] WLR 502; *Turner v Sullivan* (1862) 6 LT 130 (statements by counsel).

5 See *Puddifoot v Evening Standard Co Ltd* (1935) Times, 16-17 May, where evening papers which published sensational reports of a charge made against the plaintiff went to press before the charges were refuted and were found guilty of libel; and see *Farmer v Daily News Ltd* (1935) Times, 18 May; *Mitchell v Hirst, Kidd and Rennie Ltd* [1936] 3 All ER 872 (reporters, through inattention, failed to report withdrawal of charge of theft).

6 See *Saunders v Mills* (1829) 6 Bing 213 at 218-219; *Kane v Mulvany* (1866) IR 2 CL 402.

7 See *MacDougall v Knight* (1889) 14 App Cas 194 at 200, HL, per Lord Halsbury C (a partial account of what takes place in a court of justice may be the exact reverse of putting the person to whom publication is made in the same position as if he were present himself, and a fair and accurate report of a judge's judgment or summing up may be such a partial report of the case as not to be fair and accurate).

8 A fair sketch of a parliamentary debate is similarly privileged: see *Cook v Alexander* [1974] QB 279, [1973] 3 All ER 1037, CA.

9 *Lewis v Levy* (1858) EB & E 537 (approved in *Milissich v Lloyds* (1877) 46 LJQB 404, CA), as interpreted and followed in *MacDougall v Knight & Son* (1886) 17 QBD 636, CA; affd (1889) 14 App Cas 194, HL; *MacDougall v Knight* (1890) 25 QBD 1 at 7, CA. As to leaving to the jury the question of the fairness and accuracy of a report of the judge's summing up see *Milissich v Lloyds* supra. As to extracts from a register of judgments see *Searles v Scarlett* [1892] 2 QB 56, CA. Circulars purporting to give the effect of a judgment may be restrained by injunction if they are untrue: see *Hayward & Co v Hayward & Sons* (1886) 34 ChD 198. The publication in a trade gazette of an extract from a deed of inspectorship which is inaccurate may be a libel: see *Reis v Perry* (1895) 64 LJQB 566.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/B. THE COMMON LAW PROTECTION/129. Comments and headings.

## 129. Comments and headings.

A report is accurate if it truly states the result of a legal proceeding, even though it does not state the grounds<sup>1</sup>. However, a report must not be expanded or interspersed with comments<sup>2</sup>. The heading to a report of proceedings in court or in Parliament forms no part of the proceedings and will not be within the privilege of the occasion unless it gives a fair summary of the matter contained in the report<sup>3</sup>.

1 *Duncan v Associated Scottish Newspapers Ltd* 1929 SC 14.

2 See *Andrews v Chapman* (1853) 3 Car & Kir 286; *Stiles v Nokes* (1806) 7 East 493; *Roberts v Brown* (1834) 10 Bing 519 ('Mr J...' (counsel) 'commented with cutting severity on the testimony of Mr O'); *Delegal v Highley* (1837) 3 Bing NC 950 at 960-961. As to comments on evidence in relation to the defence of fair comment on a matter of public interest see *Hedley v Barlow* (1865) 4 F & F 224; *Woodgate v Ridout* (1865) 4 F & F 202; and PARA 139 note 13 post.

3 *Lewis v Clement* (1820) 3 B & Ald 702; on appeal (1822) 7 Moore CP 200, Ex Ch ('Shameful Conduct of an Attorney'); *Bishop v Latimer* (1861) 4 LT 775 ('How Lawyer Bishop treats his Clients'). Cf *Leon v Edinburgh Evening News Ltd* 1909 SC 1014 ('The Edinburgh Licensing Prosecution, Prisoners Acquitted' was held not libellous). As to headlines and heavy type see also *Crowne v Warden & Co Ltd* (1968) 112 Sol Jo 824, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/B. THE COMMON LAW PROTECTION/130. The burden of proof.

### 130. The burden of proof.

In connection with qualified privilege the burden of proving that a report of judicial or parliamentary proceedings<sup>1</sup> is fair and accurate<sup>2</sup> is on the defendant, and the question for the jury is whether the report is fair and accurate, not whether the reporter was negligent<sup>3</sup>. If the judge considers that the evidence called on behalf of the plaintiff substantially proves the defendant's case in this respect, and there is no material omission, he will be justified in refusing to leave the issue to the jury<sup>4</sup>, but will usually do so to prevent the necessity of a new trial should the Court of Appeal take the opposite view<sup>5</sup>. However, the fairness of the report will not assist the defendant if the plaintiff establishes actual malice<sup>6</sup>.

1 Although the treatment here of the common law protection is concerned with the privilege of reports of judicial proceedings, the privilege of reports of parliamentary and other proceedings is similar (see PARA 125 ante) subject to any special statutory modifications: see PARAS 126 ante, 131-134 post.

2 As to what constitutes a fair and accurate report see PARA 128 ante.

3 See *Furniss v Cambridge Daily News Ltd* (1907) 23 TLR 705, CA, where the report followed the abstract of the charge in the charge sheet, which did not correspond with the summons.

4 *Kimber v Press Association Ltd* [1893] 1 QB 65 at 71-73, CA; and see *Capital and Counties Bank v Henty & Sons* (1880) 5 CPD 514, CA; affd (1882) 7 App Cas 741, HL; referred to in *Kimber v Press Association Ltd* supra at 74.

5 *Hope v WC Leng & Co (Sheffield Telegraph) Ltd* (1907) 23 TLR 243, CA.

6 *Stevens v Sampson* (1879) 5 Ex D 53, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/C. PROTECTION BY STATUTE/131. Statutory qualified privilege.

### C. PROTECTION BY STATUTE

#### 131. Statutory qualified privilege.

Subject to certain qualifications<sup>1</sup>, the publication<sup>2</sup> of any specified report or other statement<sup>3</sup> is privileged unless the publication is shown to be made with malice<sup>4</sup>. Nothing in this provision is, however, to be construed:

- 61 (1) as protecting the publication of matter the publication of which is prohibited by law<sup>5</sup>; or
- 62 (2) as limiting or abridging any privilege otherwise subsisting<sup>6</sup>.

Nor does the statutory privilege apply to the publication to the public, or a section of it, of matter which is not of public concern and the publication of which is not for the public benefit<sup>7</sup>, these being questions for the jury<sup>8</sup>.

1 Ie subject to the Defamation Act 1996 s 15(2)-(4): see heads (1)-(2) in the text; and PARAS 132-133 post. At the date at which this volume states the law, s 15 had not been brought into force.

2 For the meaning of 'publication' see PARA 100 note 2 ante. It is not necessary to the privilege that the reports be in newspapers or broadcasts, nor that they be published contemporaneously.

3 le any report or statement mentioned in the Defamation Act 1996 s 15(1), Sch 1; see note 1 supra: and PARAS 132-133 post. For the meaning of 'statement' see PARA 10 note 1 ante.

4 Ibid s 15(1); and see note 1 supra.

5 Ibid s 15(4)(a); and see note 1 supra.

6 Ibid s 15(4)(b); and see note 1 supra.

7 Ibid s 15(3); and see note 1 supra.

8 See *Kingshott v Associated Kent Newspapers Ltd* [1991] 1 QB 88, [1991] 2 All ER 99, CA (a decision on the similar provision formerly made by the Defamation Act 1952). See also *Tsikata v Newspaper Publishing plc* [1997] 1 All ER 655, CA.

## UPDATE

### 131 Statutory qualified privilege

NOTE 1--1996 Act s 15 in force 1 April 1999: SI 1999/817.

NOTE 4--See *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432, [2008] 3 All ER 911 (privilege attached to report of parliamentary proceedings not lost by inclusion of extraneous non-privileged material).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/C. PROTECTION BY STATUTE/132. Reports and statements protected by qualified privilege without explanation or contradiction.

### 132. Reports and statements protected by qualified privilege without explanation or contradiction.

The following reports and statements<sup>1</sup> enjoy qualified privilege without any requirement of explanation or contradiction<sup>2</sup>:

- 63 (1) a fair and accurate report of proceedings in public of a legislature<sup>3</sup> anywhere in the world<sup>4</sup>;
- 64 (2) a fair and accurate report of proceedings in public before a court<sup>5</sup> anywhere in the world<sup>6</sup>;
- 65 (3) a fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world<sup>7</sup>;
- 66 (4) a fair and accurate report of proceedings in public anywhere in the world of an international organisation<sup>8</sup> or an international conference<sup>9</sup>;
- 67 (5) a fair and accurate copy of or extract from any register or other document required by law to be open to public inspection<sup>10</sup>;
- 68 (6) a notice or advertisement published<sup>11</sup> by or on the authority of a court, or of a judge or officer of a court, anywhere in the world<sup>12</sup>;
- 69 (7) a fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world<sup>13</sup>;
- 70 (8) a fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference<sup>14</sup>.

1 For the meaning of 'statement' see PARA 10 note 1 ante.

2 Defamation Act 1996 s 15(1), (2), Sch 1 Pt I (paras 1-8). At the date at which this volume states the law, s 15, Sch 1 had not been brought into force. As to explanation or contradiction see PARA 133 post.

3 'Legislature' includes a local legislature; and for the purposes of heads (1), (3) and (7) in the text, also includes the European Parliament: *ibid* Sch 1 para 16(1), (2); and see note 2 *supra*.

4 *Ibid* Sch 1 para 1; and see note 2 *supra*.

5 'Court' includes any tribunal or body exercising the judicial power of the State: *ibid* Sch 1 para 16(1). For the purposes of heads (2), (6) in the text, 'court' includes (1) the European Court of Justice (or any court attached to that court) and the Court of Auditors of the European Communities; (2) the European Court of Human Rights; (3) any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the United Kingdom is a party; and (4) the International Court of Justice and any other judicial or arbitral tribunal deciding matters in dispute between States: Sch 1 para 16(3). As to commencement of Sch 1 para 16 see note 2 *supra*. As to international criminal tribunals see further WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 463.

6 *Ibid* Sch 1 para 2; and see note 2 *supra*.

7 *Ibid* Sch 1 para 3; and see notes 2-3 *supra*.

8 'International organisation' means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation: *ibid* Sch 1 para 16(1); and see note 2 *supra*.

9 *Ibid* Sch 1 para 4. 'International conference' means a conference attended by representatives of two or more governments: Sch 1 para 16(1). As to commencement of Sch 1 see note 2 *supra*.

10 *Ibid* Sch 1 para 5; and see note 2 *supra*.

11 For the meaning of 'publish' see PARA 100 note 2 *ante*.

12 Defamation Act 1996 Sch 1 para 6; and see notes 2, 5 *supra*.

13 *Ibid* Sch 1 para 7; and see notes 2-3 *supra*.

14 *Ibid* Sch 1 para 8; and see note 2 *supra*.

## UPDATE

### **132 Reports and statements protected by qualified privilege without explanation or contradiction**

NOTE 2--1996 Act s 15, Sch 1 in force 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/C. PROTECTION BY STATUTE/133. Reports and statements privileged subject to explanation or contradiction.

### **133. Reports and statements privileged subject to explanation or contradiction.**

In defamation proceedings in respect of the publication<sup>1</sup> of a report or other statement<sup>2</sup> mentioned below, there is no statutory defence of qualified privilege<sup>3</sup> if the plaintiff shows that the defendant was requested by him to publish in a suitable manner<sup>4</sup> a reasonable letter or statement by way of explanation or contradiction and that he refused or neglected to do so<sup>5</sup>. The terms of the letter or statement which the plaintiff requires must be sent by him to the defendant as part of the request<sup>6</sup>.

The reports and statements to which these provisions apply are:

71 (1) a fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of:

1

1. (a) a legislature<sup>7</sup> in any member state<sup>8</sup> or the European Parliament;
2. (b) the government of any member state, or any authority performing governmental functions<sup>9</sup> in any member state or part of a member state, or the European Commission;
3. (c) an international organisation<sup>10</sup> or international conference<sup>11</sup>;

2

72 (2) a fair and accurate copy of or extract from a document made available by a court<sup>12</sup> in any member state or the European Court of Justice (or any court attached to that court), or by a judge or officer of any such court<sup>13</sup>;

73 (3) a fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom<sup>14</sup> of:

3

4. (a) a local authority<sup>15</sup> or local authority committee<sup>16</sup>;
5. (b) a justice or justices of the peace acting otherwise than as a court exercising judicial authority;
6. (c) a commission, tribunal, committee or person appointed for the purposes of any inquiry by any statutory provision<sup>17</sup>, by Her Majesty or by a Minister of the Crown or a Northern Ireland Department;
7. (d) a person appointed by a local authority to hold a local inquiry in pursuance of any statutory provision;
8. (e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any statutory provision<sup>18</sup>;

4

74 (4) a fair and accurate report of any corresponding proceedings in any of the Channel Islands or the Isle of Man or in another member state<sup>19</sup>;

75 (5) a fair and accurate report of proceedings at any public meeting<sup>20</sup> held in a member state<sup>21</sup>;

76 (6) a fair and accurate report of proceedings at a general meeting of a United Kingdom public company<sup>22</sup>;

77 (7) a fair and accurate copy of or extract from any document circulated to members of a United Kingdom public company:

5

9. (a) by or with the authority of the board of directors of the company,

10. (b) by the auditors of the company, or

11. (c) by any member of the company in pursuance of a right conferred by any statutory provision<sup>23</sup>;

6

78 (8) a fair and accurate copy of or extract from any document circulated to members of a United Kingdom public company which relates to the appointment, resignation, retirement or dismissal of directors of the company<sup>24</sup>;

79 (9) a fair and accurate report of proceedings at any corresponding meeting of, or copy of or extract from any corresponding document circulated to members of, a public company formed under the law of any of the Channel Islands or the Isle of Man or of another member state<sup>25</sup>;

80 (10) a fair and accurate report of any finding or decision of any of the following descriptions of association, formed in the United Kingdom or another member state, or of any committee or governing body of such an association:

7

12. (a) an association formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate on matters of interest or concern

to the association, or the actions or conduct of any person subject to such control or adjudication;

13. (b) an association formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with that trade, business, industry or profession, or the actions or conduct of those persons;
  14. (c) an association formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime;
  15. (d) an association formed for the purpose of promoting charitable objects or other objects beneficial to the community and empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication<sup>26</sup>;
- 8
- 81 (11) a fair and accurate report of, or copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for these purposes:
- 9
16. (a) for England and Wales or Northern Ireland, by order<sup>27</sup> of the Lord Chancellor, and
  17. (b) for Scotland, by order of the Secretary of State<sup>28</sup>.
- 10

1 For the meaning of 'publish' see PARA 100 note 2 ante.

2 For the meaning of 'statement' see PARA 10 note 1 ante.

3 Ie under the Defamation Act 1996 s 15: see PARAS 131-132 ante. At the date at which this volume states the law, s 15, Sch 1 had not been brought into force.

4 For this purpose 'in a suitable manner' means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances: *ibid* s 15(2); and see note 3 *supra*.

5 *Ibid* s 15(2)(a), (b); and see note 3 *supra*.

6 See *Khan v Ahmed* [1957] 2 QB 149, [1957] 2 All ER 385 (a decision on the similar provision formerly made by the Defamation Act 1952).

7 For the meaning of 'legislature' see PARA 132 note 3 ante.

8 For these purposes, references to a member state include any European dependent territory of a member state: Defamation Act 1996 s 15(2), Sch 1 para 16(2); and see note 3 *supra*.

9 For these purposes, 'governmental functions' includes police functions: *ibid* Sch 1 para 9(2); and see note 3 *supra*.

10 For the meaning of 'international organisation' see PARA 132 note 8 ante.

11 Defamation Act 1996 Sch 1 para 9(1); and see note 3 *supra*. For the meaning of 'international conference' see PARA 132 note 9 ante.

12 For the meaning of 'court' see PARA 132 note 5 ante.

13 Defamation Act 1996 Sch 1 para 10; and see note 3 *supra*.

14 For the meaning of 'United Kingdom' see PARA 76 note 3 ante.



15 For these purposes, 'local authority' means (1) in relation to England and Wales, a principal council within the meaning of the Local Government Act 1972, any body falling within any paragraph of s 100J(1) (as added) or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies; (2) in relation to Scotland, a council constituted under the Local Government etc (Scotland) Act 1994 s 2 or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies; (3) in relation to Northern Ireland, any authority or body to which the Local Government Act (Northern Ireland) 1972 ss 23-27 apply: Defamation Act 1996 Sch 1 para 11(2); and see note 3 supra.

16 Ibid Sch 1 para 11(1); and see note 3 supra. For these purposes, 'local authority committee' means any committee of a local authority or of local authorities, and includes (1) any committee or sub-committee in relation to which the Local Government Act 1972 ss 100A-100D (as added) apply by virtue of s 100E (as added) (whether or not also by virtue of s 100J (as added)); and (2) any committee or sub-committee in relation to which the Local Government (Scotland) Act 1973 ss 50A-50D (as added) apply by virtue of s 50E (as added): Defamation Act 1996 Sch 1 para 11(2); and see note 3 supra.

17 For the meaning of 'statutory provision' see PARA 100 note 4 ante.

18 Defamation Act 1996 Sch 1 para 11(1); and see note 3 supra.

19 Ibid Sch 1 para 11(3). Provision may be made by order identifying for these purposes the corresponding proceedings referred to: Sch 1 para 17(1)(a). Such an order may be made for England and Wales or Northern Ireland by the Lord Chancellor and for Scotland by the Secretary of State and must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 1 para 17(2), (3). At the date at which this volume states the law, Sch 1 had not been brought into force and consequently no such order had been made.

20 For these purposes, a 'public meeting' means a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public concern, whether admission to the meeting is general or restricted: ibid Sch 1 para 12(2); and see note 3 supra.

21 Ibid Sch 1 para 12(1); and see note 3 supra.

22 Ibid Sch 1 para 13(1). For the purposes of heads (6)-(8) in the text, 'United Kingdom public company' means (1) a public company within the meaning of the Companies Act 1985 s 1(3) or the Companies (Northern Ireland) Order 1986 art 12(3); or (2) a body corporate incorporated by or registered under any other statutory provision, or by royal charter, or formed in pursuance of letters patent: Defamation Act 1996 Sch 1 para 13(4). As to the commencement of Sch 1 see note 3 supra.

23 Ibid Sch 1 para 13(2); and see note 3 supra.

24 Ibid Sch 1 para 13(3); and see note 3 supra.

25 Ibid Sch 1 para 13(5). Provision may be made by order identifying for these purposes the corresponding meetings and documents referred to: Sch 1 para 17(1)(b). As to the procedure for making the order see Sch 1 para 17(2), (3); and note 19 supra. At the date at which this volume states the law, Sch 1 had not been brought into force and consequently no such order had been made.

26 Ibid Sch 1 para 14; and see note 3 supra.

27 An order under this provision must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: ibid Sch 1 para 15(2). At the date at which this volume states the law, Sch 1 had not been brought into force and consequently no such order had been made.

28 Ibid Sch 1 para 15(1); and see note 3 supra.

## UPDATE

### 133 Reports and statements privileged subject to explanation or contradiction

NOTES 3, 19, 25, 27--Section 15, Sch 1 now in force: SI 1999/817.

TEXT AND NOTES 15, 16--Head (a). In the case of a local authority operating executive arrangements, meetings of the executive or a committee of the executive are included in this head: Defamation Act 1996 Sch 1 para 11(1)(a) (amended by Local Authorities (Executive and Alternative Arrangements) (Modification of Enactments and Other

Provisions) (England) Order 2001, SI 2001/2237; Local Authorities (Executive and Alternative Arrangements) (Modification of Enactments and Further Provisions) (Wales) Order 2002, SI 2002/808).

Also, head (aa) in the case of a local authority operating executive arrangements, a fair and accurate record of any decision made by any member of the executive where that record is required to be made and available for public inspection by virtue of the Local Government Act 2000 s 22 or of any provision in regulations made thereunder: Defamation Act 1996 Sch 1 para 11(1A) (added by SI 2001/2237 (England), SI 2002/808 (Wales)).

TEXT AND NOTES 17, 18--Head (c) after 'Minister of the Crown' read ', National Assembly for Wales': 1996 Act Sch 1 para 11(1) (amended by the Government of Wales Act 2006 Sch 10 para 40). As to the National Assembly for Wales generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

NOTE 22--Defamation Act 1996 Sch 1 para 13(4) amended: SI 2009/1941.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(3) QUALIFIED PRIVILEGE/(iv) Privileged Reports/C. PROTECTION BY STATUTE/134. Extracts from or abstracts of parliamentary proceedings.

### **134. Extracts from or abstracts of parliamentary proceedings.**

In any civil or criminal proceedings<sup>1</sup> for printing or including in a programme service<sup>2</sup> any extract from or abstract of parliamentary reports, papers, votes or proceedings<sup>3</sup>, the defendant may put the reports or other proceedings in evidence, and if the jury is satisfied that the extract or abstract was published without malice it must find for the defendant<sup>4</sup>. This qualified privilege does not affect in any way the privileges of Parliament<sup>5</sup>.

1 As to criminal proceedings for libel see PARA 288 et seq post.

2 For the meaning of 'programme service' see PARA 76 ante.

3 As to the absolute privilege of authorised reports of parliamentary proceedings and copies of them see PARAS 102-105 ante.

4 See the Parliamentary Papers Act 1840 s 3 (amended by virtue of the Broadcasting Act 1990 s 203(1), Sch 20 para 1). The Defamation Act 1952 s 9(1), which previously extended the privilege to include broadcasting by means of wireless telegraphy, has not been repealed but appears to have been superseded in practice by the 1990 provision. In *Houghton v Plimsoll* (1874) Times, 2 April, Amphlett B appears to have directed the jury that the Parliamentary Papers Act 1840 s 3 applied to the publication of an extract from a parliamentary paper in an ordinary serial magazine. In *Mangena v Wright* [1909] 2 KB 958 at 976, Phillimore J said that there was a little difficulty in the use of the word 'printing' instead of 'publishing' in the first part of the Parliamentary Papers Act 1840 s 3, but that it was not enough to take away the protection given by that provision; see further PARA 105 note 3 ante. A defendant who fails to justify defamatory statements which are not privileged cannot mitigate his damage by reference to extracts (which are privileged) of parliamentary proceedings published elsewhere to the same effect as his libel: *Associated Newspapers Ltd v Dingle* [1964] AC 371, [1962] 2 All ER 737, HL.

5 Parliamentary Papers Act 1840 s 4. As to the privileges of Parliament generally see PARLIAMENT vol 78 (2010) PARA 1076 et seq.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(i) Introduction/135. The defence of fair comment.

## (4) FAIR COMMENT

### (i) Introduction

#### 135. The defence of fair comment.

In the nineteenth century the defence of fair comment came to be recognised<sup>1</sup> as distinct from the law of privilege<sup>2</sup>. The distinction between them is clear. The defence of privilege is in the nature of a restricted right and is only available at common law to a defendant who has a duty to make the communication to a person who has, or persons who have, a legitimate interest in receiving it<sup>3</sup>. The defence of fair comment is in the nature of a general right, and enables any member of the public to express defamatory opinions on matters of public interest<sup>4</sup>. Such opinions must be based on true facts or facts stated on a privileged occasion<sup>5</sup> and the defence only applies to statements which are recognisable by the reader or listener as expressions of opinion rather than statements of fact<sup>6</sup>. Fair comment may be pleaded in the alternative to justification<sup>7</sup>. The defence is defeated on proof by the plaintiff that the defendant made the defamatory comment maliciously<sup>8</sup>. The mere fact that a defence of fair comment is persisted in and fails at trial is not admissible in aggravation of damages in contrast to an unsuccessful plea of justification<sup>9</sup>.

1 See *Wason v Walter* (1868) LR 4 QB 73 at 93-94 per Cockburn CJ. See also PARA 138 post.

2 *Henwood v Harrison* (1872) LR 7 CP 606 at 623-624 per Willes J. See also *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100 at 104, CA. As to whether fair comment is a right or a privilege and for a comparison between the defences of fair comment and qualified privilege see *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627, CA, per Lord Collins MR; *Campbell v Spottiswoode* (1863) 3 B & S 769 at 778 per Crompton J and at 780 per Blackburn J (approved in *Merivale v Carson* (1887) 20 QBD 275, CA); *McQuire v Western Morning News Co Ltd* supra; *Plymouth Mutual Co-operative and Industrial Society Ltd v Traders' Publishing Association Ltd* [1906] 1 KB 403, CA.

3 As to the defence of privilege see PARAS 94-134 ante.

4 *Campbell v Spottiswoode* (1863) 3 B & S 769. The defence is one of the essential elements of free speech and must not be whittled down by legal or linguistic refinements: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 170, [1968] 1 All ER 497 at 503, CA, per Lord Denning MR and at 179 and 508 per Lord Diplock. See also *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516, [1958] 1 WLR 743; *Lyon v Daily Telegraph Ltd* [1943] KB 746, [1943] 2 All ER 316, CA; *Evans v London Chamberlain* (1767) 2 Burn's Eccl Law (9th Edn) 207, HL, cited in 8 Holdsworth's History of English Law (3rd Edn) 414; *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627 at 638, CA, per Lord Collins MR.

5 *London Artists v Littler* [1969] 2 QB 375, [1969] 2 All ER 193, CA; *Grech v Odhams Press Ltd* [1958] 2 QB 275, [1958] 2 All ER 462, CA.

6 *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319, CA; *Telnikoff v Matusevitch* [1992] 2 AC 343, [1991] 4 All ER 817, HL. See also PARA 138 post.

7 Where both justification and fair comment are pleaded, the former can fail and the latter may succeed subject to the question of malice: *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 at 539, [1965] 1 WLR 805 at 823, CA, per Davies LJ. As to justifying comment see PARA 88 ante. See also PARAS 84-88 ante, 148 post.

8 As to malice see PARA 149 post.

9 *Cornwell v Myskow* [1987] 2 All ER 504, [1987] 1 WLR 630, CA. If, however, the plea of fair comment failed because malice was proved, the malice would be admissible in aggravation of damage.

### 136. Requirements of defence.

The relevant statement must be (1) recognisable as comment<sup>1</sup>; (2) on a matter of public interest<sup>2</sup>; (3) based on a fact or facts that are truly stated or stated on a privileged occasion<sup>3</sup>; and (4) a comment on such fact or facts within the wide limits which the law allows<sup>4</sup>.

1 As to what is comment see PARA 138 post.

2 As to public interest see PARA 139 post.

3 See PARA 140 post.

4 See PARA 145 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(i) Introduction/137. Effect of malice.

### 137. Effect of malice.

The defence of fair comment is defeated if the plaintiff pleads and proves that the defendant published the comment maliciously<sup>1</sup>. Evidence of malice is accordingly admissible<sup>2</sup> and it is for the court to decide as a question of fact whether the defendant was actuated by malice in publishing the comment complained of.

1 As to express malice generally see PARAS 149-156 post. As to the particular application of malice to fair comment see PARA 156 post. See also *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627 at 642, CA; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL. However, the doctrine has been criticised: see *Adams v Sunday Pictorial Newspapers (1920) Ltd and Champion* [1951] 1 KB 354 at 359-360, [1951] 1 All ER 865 at 868, CA, per Lord Denning MR. As to the effect of motive see *Campbell v Spottiswoode* (1863) 3 B & S 769 at 781 per Blackburn J; cited in *Thomas v Bradbury, Agnew & Co Ltd* supra at 641; *Horrocks v Lowe* [1975] AC 135 at 149-151, [1974] 1 All ER 662 at 669-671, HL, per Lord Diplock (malice should only be found where the defendant's dominant motive is malicious; this was in relation to the defence of qualified privilege, but it would seem to apply to fair comment). The possibility of a person having a spite against another, and yet bringing a dispassionate judgment to bear upon his literary work has been judicially recognised: *Thomas v Bradbury, Agnew & Co Ltd* supra at 642 per Collins MR. For the comparison between fair comment and justification see PARA 148 post.

2 See the cases cited in note 1 supra; and *Bergman v Macadam* (1941) 191 LT Jo 131; *Adams v Sunday Pictorial Newspapers (1920) Ltd and Champion* [1951] 1 KB 354 at 360, [1951] 1 All ER 865 at 868, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/138. Comment is an expression of opinion.

### (ii) Essentials of the Defence

#### 138. Comment is an expression of opinion.

The defence of fair comment applies only to words recognisable as 'comment' in the sense of an expression of opinion and not to mere assertions of fact<sup>1</sup>. In considering whether the words complained of would reasonably have been understood as comment they may be read in their proper context within the publication as a whole, but regard may not otherwise be had to

matter outside those words even if it comprises matter at which the comment is directed<sup>2</sup>. If no facts to support the comment are set out or referred to in the words, either expressly or by implication, the words will be treated as a statement of fact<sup>3</sup>. The use of prefatory words such as 'in my opinion' are not necessarily decisive in favour of comment, but will indicate comment, where some supporting facts are set out or referred to<sup>4</sup>. Since the words must be recognisable as comment, comment must not be so mixed up with the facts that the reader cannot distinguish between what is comment and what is not<sup>5</sup>. The issue is for the jury to decide, provided the judge directs that the words are capable of being understood as comment<sup>6</sup>.

1 Where appropriate, defamatory statements of fact may be met by the defences of justification or qualified privilege. As to justification see PARA 82 et seq ante. As to qualified privilege see PARA 109 et seq ante.

2 *Telnikoff v Matushevitch* [1992] 2 AC 343, [1991] 4 All ER 817, HL.

3 *Kemsley v Foot* [1952] AC 345 at 356, [1952] 1 All ER 501 at 505, HL, per Lord Porter ('if a writer chooses to publish an expression of opinion which has no relation by way of criticism to any fact before the reader, then such an expression of opinion depends on nothing but the writer's own authority and stands in the same position as an allegation of fact'). See also *O'Brien v Marquis of Salisbury* (1889) 54 JP 215 at 216, DC, per Field J; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 474, HL, per Lord Daksey. Cf *Dakhyl v Labouchere* [1908] 2 KB 325n, HL; and *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279, Aust HC ('quack').

4 *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 474, HL, per Lord Oaksey. See also the cases cited in notes 2-3 supra.

5 *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319-320, CA, per Fletcher Moulton LJ, disapproving *Lefroy v Burnside* (1879) 4 LR 1r 556, and approving *Andrews v Chapman* (1853) 3 Car & Kir 286. As to particulars of the facts on which fair comment is based see PARA 191 post. See also *Cox v Lee* (1869) LR 4 Exch 284; *Davis v Shepstone* (1886) 11 App Cas 187 at 190, PC.

6 *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 461, HL, per Lord Porter; *Jones v Skelton* [1963] 3 All ER 952 at 964-965, [1963] 1 WLR 1362 at 1379, PC; *London Artists Ltd v Littler* [1969] 2 QB 375 at 394-395, [1969] 2 All ER 193 at 202, CA, per Edmund Davies LJ; *Telnikoff v Matushevitch* [1992] 2 AC 343, [1991] 4 All ER 817, HL. As to the functions of judge and jury see PARA 241 post.

## UPDATE

### 138 Comment is an expression of opinion

NOTE 1--As to an expression of opinion, see *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2010] All ER (D) 08 (Apr).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/139. Matters of public interest.

### 139. Matters of public interest.

There is no exhaustive definition of a matter of public interest<sup>1</sup>, which is an issue for the judge to decide. The public acts of public persons are certainly matters of public interest<sup>2</sup>, such as a decision of magistrates<sup>3</sup>, the conduct of public worship by a clergyman<sup>4</sup>, the speeches of public speakers<sup>5</sup> or the attitudes of politicians<sup>6</sup>. The terms of an architect's employment by a local authority<sup>7</sup>, the conduct and employment of the manager of a public cemetery<sup>8</sup>, the discharge by a deputy returning officer of his statutory duties<sup>9</sup>, the housing of workmen<sup>10</sup>, the management of a college<sup>11</sup>, proposals submitted to the Admiralty<sup>12</sup>, proceedings in court<sup>13</sup> or Parliament<sup>14</sup>, the custody of papers of public interest<sup>15</sup>, the offering of insurance against kidnapping<sup>16</sup> and the contents of a newspaper<sup>17</sup> are examples of matters of public interest.

A published book or letter or article<sup>18</sup>, a picture publicly exhibited<sup>19</sup>, a play performed in public<sup>20</sup>, an architect's works<sup>21</sup>, a flower exhibition<sup>22</sup> and similar matters are of public interest<sup>23</sup>.

1 Matters of public concern are matters of public interest for the purposes of fair comment: *London Artists Ltd v Littler* [1969] 2 QB 375 at 391, [1969] 2 All ER 193 at 198, CA, per Lord Denning MR, commenting on *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, CA.

2 See *Kane v Mulvany* (1866) IR 2 CL 402. As to public persons being open to criticism see *Parmiter v Coupland* (1840) 6 M & W 105 and, in a different context, *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011, HL. The cases cited in notes 3-23 infra are only cited as examples of what are matters of public interest. The cases before *Campbell v Spottiswoode* (1863) 3 B & S 769 are of little value as authorities on fair comment. See now *Kemsley v Foot* [1952] AC 345 at 355, [1952] 1 All ER 501 at 504, HL; and cf *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL.

3 *Hibbins v Lee* (1864) 4 F & F 243.

4 *Kelly v Tinling* (1865) LR 1 QB 699. Cf and see as to criticising sermons *Gathercole v Miall* (1846) 15 M & W 319; see also ECCLESIASTICAL LAW vol 14 para 674.

5 *Odger v Mortimer* (1873) 28 LT 472.

6 *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516, [1958] 1 WLR 743.

7 *John Leng & Co Ltd v Langlands* (1916) 114 LT 665, HL.

8 *Sharman v Merritt and Hatcher Ltd* (1916) 32 TLR 360.

9 *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309, CA.

10 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, CA.

11 *Cox v Feeney* (1863) 4 F & F 13.

12 *Henwood v Harrison* (1872) LR 7 CP 606, discussed in *Merivale v Carson* (1887) 20 QBD 275, CA.

13 *Hedley v Barlow* (1865) 4 F & F 224; *Kane v Mulvany* (1866) IR 2 CL 402; *Woodgate v Ridout* (1865) 4 F & F 202; *Risk Allah Bey v Whitehurst* (1868) 18 LT 615. The reports of the proceedings, if fair and accurate, are protected by the defence of privilege (see PARA 94 et seq ante), but this does not extend to the reporter's comments. As to comments on privileged statements see PARA 142 post.

14 *Kane v Mulvany* (1866) IR 2 CL 402; *Wason v Walter* (1868) LR 4 QB 73; *Campbell v Spottiswoode* (1863) 3 B & S 769 at 778 per Crompton J. A petition to Parliament is a matter of public interest: see *Dunne v Anderson* (1825) 3 Bing 88; *Wason v Walter* supra.

15 *Turnbull v Bird* (1861) 2 F & F 508.

16 *Control Risks Ltd v New English Library Ltd* [1989] 3 All ER 577, [1990] 1 WLR 183, CA.

17 *Latimer v Western Morning News Co* (1871) 25 LT 44, where it was held, however, that a newspaper's circulation is not a matter of public interest. This aspect of the decision is probably now outdated.

18 See *Campbell v Spottiswoode* (1863) 3 B & S 769; approved in *Merivale v Carson* (1887) 20 QBD 275, CA. As to irrelevant criticism see *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, CA; and PARA 146 note 1 post. As to literary criticism see *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627, CA; and PARA 146 post. A placard by way of advertisement may be commented on: see *Paris v Levy* (1860) 9 CBNS 342; affg 2 F & F 71, referred to in *Campbell v Spottiswoode* supra. An attack on the author's personal character is not literary criticism: see *Merivale v Carson* supra at 284; and see PARA 146 note 1 post. As to what is not a libel on an author see *Carr v Hood* (1808) 1 Camp 355n; and *Soane v Knight* (1827) Mood & M 74. As to what is such a libel see *Fraser v Berkeley* (1836) 7 C & P 621; and cf the dicta in *Merivale v Carson* supra. See also PARA 145 post.

19 *Thompson v Shackell* (1828) Mood & M 187 at 188. See this and other cases in notes to 1 Wms Saund 137, 144 note (h).

20 *Merivale v Carson* (1887) 20 QBD 275, CA; *London Artists Ltd v Littler* [1969] 2 QB 375, [1969] 2 All ER 193, CA, where simultaneous written notice was given by three leading actors in a play.

21 *Soane v Knight* (1827) Mood & M 74.

22 *Green v Chapman* (1837) 4 Bing NC 92, where the words were held not to be within the limits of fair criticism.

23 See *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, CA; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL. As to where comment on a matter of public interest is otherwise honest and fair but imputes wicked motives to the plaintiff see PARA 147 post.

## UPDATE

### 139 Matters of public interest

NOTE 6--*Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] All ER (D) 178 (Jan) (articles written about member of Parliament's involvement with Iraq not disclosed in public interest and did not attract privilege).

NOTE 20--See *Burstein v Associated Newspapers Ltd* [2007] EWCA Civ 600, [2007] 4 All ER 319 (review implying that play was sympathetic to terrorists was fair comment on matter of public interest).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/140. Comment on facts truly stated.

### 140. Comment on facts truly stated.

The defendant must plead the facts on which the comment was based<sup>1</sup> and the facts must have been in existence when the comment was made<sup>2</sup>. By statute, in an action for libel or slander in respect of words<sup>3</sup> consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment does not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved<sup>4</sup>.

1 As to pleading the facts on which the comment is based see PARA 191 post; and CIVIL PROCEDURE.

2 *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407, [1968] 1 WLR 916, CA.

3 As to the meaning of 'words' see PARA 11 note 1 ante.

4 Defamation Act 1952 s 6. See also *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000 at 1033-1034, [1986] 2 All ER 84 at 103, CA, per O'Connor LJ. At common law, where the facts are fully stated in the words complained of, the defendant must prove all those facts to be true: *Kemsley v Foot* [1952] AC 345 at 357-358, [1952] 1 All ER 501 at 506, HL, per Lord Porter; *Digby v Financial News Ltd* [1907] 1 KB 502, CA; *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 251, CA. See also the direction in *Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292, CA, quoted in *Peter Walker & Son Ltd v Hodgson* supra at 252; *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 320, CA; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA; and see *Peter Walker & Son Ltd v Hodgson* supra at 254, referring to *Campbell v Spottiswoode* (1863) 3 B & S 769, and *Dakhyl v Labouchere* [1908] 2 KB 325n at 329n, HL, per Lord Atkinson, and citing in argument *Lord Hindlip v Mudford* (1890) 6 TLR 367. Where, however, the facts are indicated but not stated in the words complained of, and the defendant pleads those facts to support his comment, the common law rule is less strict, and the defence does not fail if the defendant fails to prove all those facts, provided that the fact or facts that are proved are sufficient to support the comment: *Kemsley v Foot* [1952] AC 345 at 358, [1952] 1 All ER 501 at 506, HL, per Lord Porter.

## UPDATE

### 140 Comment on facts truly stated

NOTE 4--See also *Joseph v Spiller* [2009] EWCA Civ 1075, [2010] EMLR 152, [2009] All ER (D) 238 (Oct) (libel consisted of supposed propensity to breach contracts; fair comment defence based on alleged earlier breach of contract could not stand).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/141. Subsequent facts and knowledge of facts.

#### **141. Subsequent facts and knowledge of facts.**

A defendant cannot rely on facts which were not in existence at the time of publication<sup>1</sup>. It seems that at least the original commentator such as the author of a letter published in a newspaper must have the facts in mind<sup>2</sup>, though not necessarily in the forefront of his mind, at the time of publication<sup>3</sup>. However, in a joint publication it is not clear whether each defendant must show that the facts were known to him at the time of the publication, such as where the editor, publisher and printer of a newspaper in which a writer's comment has been published participate in its publication. It is submitted that they should be entitled to rely on the facts known to the writer when the comment was published<sup>4</sup>. Were it otherwise, the scope for public debate on matters of public interest would be unduly restricted<sup>5</sup>.

A newspaper's plea of fair comment is not defeated by the mere fact that the writer has given a fictitious name and address<sup>6</sup>.

1 *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407, [1968] 1 WLR 916, CA.

2 *Wheatley v Anderson* 1927 SC 133 at 147-148 per Lord Anderson.

3 *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407 at 409, [1968] 1 WLR 916 at 920, CA, per Lord Denning MR.

4 See Duncan and Neill on Defamation (2nd Edn, 1983) PARA 12:34, but see *Cherneskey v Armadale Publishers Ltd and King* [1978] 6 WWR 618 (Can SC) (publisher not agreeing with contents of letter). As to malice in the case of a joint publication see PARAS 155-156 post. See also *Lyon v Daily Telegraph Ltd* [1943] 1 KB 746, [1943] 2 All ER 316, CA (comment on broadcast entertainment).

5 Eg it is unrealistic to require a newspaper editor to know the facts underlying every defamatory criticism in the newspaper's correspondence columns; such a restriction would also appear to be unnecessary in a democratic society within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71; Cmd 8689) art 10: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 158-159; STATUTES vol 44(1) (Reissue) PARAS 1455-1468. As to the relevance of that convention see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011, HL; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL.

6 *Lyon v Daily Telegraph Ltd* [1943] 1 KB 746, [1943] 2 All ER 316, CA.

#### **UPDATE**

#### **141 Subsequent facts and knowledge of facts**

NOTES 2, 3--A commentator may rely on a fact which he has forgotten, as it might have contributed to the formation of his opinion: *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB), [2006] 3 All ER 357.



Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/142. Comment on privileged statements.

### **142. Comment on privileged statements.**

Where an allegation is made against a person in a privileged document, for example in an extract from a parliamentary paper<sup>1</sup> or in the course of judicial proceedings<sup>2</sup>, a comment made by another on that allegation may be fair comment even if the allegation is untrue<sup>3</sup>. The comment must, however, be made on a fair and accurate report of those proceedings and, to that extent, this is an exception to the rule that the comment must be based on facts that are truly stated<sup>4</sup>.

1 *Mangena v Wright* [1909] 2 KB 958. See also *Wason v Walter* (1868) LR 4 QB 73. As to privileged documents in parliamentary proceedings and proceedings before a local commissioner for administration see PARAS 102-105 ante.

2 *Grech v Odhams Press Ltd* [1958] 2 QB 275, [1958] 2 All ER 462, CA. As to privilege in judicial proceedings see PARA 97 et seq ante.

3 *Grech v Odhams Press Ltd* [1958] 2 QB 275, [1958] 2 All ER 462, CA.

4 *Brent Walker Group plc v Time Out Ltd* [1991] 2 QB 33, [1991] 2 All ER 753, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/143. Rehabilitated offenders.

### **143. Rehabilitated offenders.**

Where a plaintiff is a rehabilitated person<sup>1</sup> and the defamatory comment is based wholly or in part on the fact that the plaintiff has committed, been charged with, prosecuted for, convicted of or sentenced for an offence which is the subject of a spent conviction<sup>2</sup>, there is no restriction on the defendant relying on a spent conviction as a fact supporting the comment<sup>3</sup>. As in any other case of fair comment, the defence is defeasible on proof that the defendant was actuated by express malice<sup>4</sup>.

1 For the meaning of 'rehabilitated person' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 661.

2 For the meaning of 'spent conviction' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 661.

3 See the Rehabilitation of Offenders Act 1974 s 8(3), (6), (7) (as amended); and as to justification see PARAS 92, 101 ante.

4 As to express malice see PARA 149 et seq post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/144. Comment on facts not in issue.

### **144. Comment on facts not in issue.**

Where the plaintiff supplies the defendant with statements of fact on which the defendant comments, the truth of those statements of fact will not be in issue between the parties<sup>1</sup>. Thus,

where a defendant is commenting on statements of fact made and supplied by the plaintiff himself, the defendant is entitled to assume that the facts as stated by the plaintiff were true and is not himself required to prove their truth.

The same principle applies to literary criticism on the plaintiff's work<sup>2</sup>.

1 See *Digby v Financial News Ltd* [1907] 1 KB 502, CA, explained in *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 254-255, CA, per Buckley LJ, where the plaintiff had issued certain advertisements and given certain documents to the defendants who summarised them and commented on them. The defendants successfully maintained that the truth or falsity of the plaintiff's statements was not an issue between them; cf *Lyons v Financial News Ltd* (1909) 53 Sol Jo 671, CA.

2 As to literary criticism see PARA 146 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/145. Comment must be fair.

### 145. Comment must be fair.

Fair comment need not be fair in the ordinary sense of moderate or balanced, since the defence may extend to protect exaggerated or biased opinions. The test is whether the comment is one which any person could honestly make on the facts proved<sup>1</sup>, however prejudiced or obstinate he may be<sup>2</sup>. The test of honesty in this context is an objective one and the defendant does not have to prove that the comment represented his honest opinion<sup>3</sup>. It is irrelevant to the test that the jury may disagree with the comment<sup>4</sup>.

It is for the jury to decide whether the comment is fair within the above test, subject to a direction from the judge that on the evidence the comment is capable of satisfying the test<sup>5</sup>.

1 As to comment on the facts truly stated see PARA 140 ante. As to the functions of judge and jury see PARA 241 post.

2 *Telnikoff v Matushevitch* [1992] 2 AC 343 at 345, [1991] 4 All ER 817 at 824, HL, per Lord Keith. Previously it was difficult to postulate a precise test in view of the varying dicta in the reported cases. See *Merivale v Carson* (1887) 20 QBD 275 at 280-281, CA, per Lord Esher MR, adopted in *Sutherland v Stopes* [1925] AC 47, HL; *Turner v Metro-Goldwyn Mayer Pictures Ltd* [1950] 1 All ER 449 at 461, HL, per Lord Porter; *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516 at 518-519, [1958] 1 WLR 743 at 747-748 per Diplock J, citing *R v Russel* (2 December 1905, unreported), QB, per Bray J.

3 *Telnikoff v Matushevitch* [1992] 2 AC 343, [1991] 4 All ER 817, HL. The subjective test of honesty in relation to the issue of malice, where the burden lies on the plaintiff, must be distinguished: see PARA 153 post.

4 See the summing-up of Lord Hewart CJ in *Stopes v Sutherland* (1924) 708 Cases on Appeals to the House of Lords 53 at 375; and of Diplock J in *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516 at 518, [1958] 1 WLR 743 at 747-748.

5 *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, CA, approved in *Sutherland v Stopes* [1925] AC 47 at 63, HL, per Viscount Finlay. See also *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 141, CA, per Lopes LJ; *Dakhyl v Labouchere* [1908] 2 KB 325n at 329n, HL, per Lord Atkinson.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/(ii) Essentials of the Defence/146. Literary criticism.

### 146. Literary criticism.

Criticism of literary or other artistic works differs from most other types of comment in that the plaintiff supplies the facts in the work on which the comment is based. In such cases it is not easy to conceive what would be outside the limits of fair comment unless the writer has misrepresented the work criticised or has made a personal attack on the author of that work<sup>1</sup>.

<sup>1</sup> *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100 at 110, CA, per Collins MR, citing *Merivale v Carson* (1887) 20 QBD 275 at 284, CA, per Bowen LJ. See also Duncan and Neill on Defamation (2nd Edn, 1983) PARA 12:18; and see PARA 139 note 18 ante.

## UPDATE

### 146 Literary criticism

NOTE 1--See *Burstein v Associated Newspapers Ltd* [2007] EWCA Civ 600, [2007] 4 All ER 319; and PARA 139 NOTE 20.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/ (iii) Personal Attacks/147. Allegations of dishonesty or dishonourable conduct.

### (iii) Personal Attacks

#### 147. Allegations of dishonesty or dishonourable conduct.

The scope of the defence of fair comment in relation to an imputation of corrupt, dishonourable or dishonest motives or conduct is unclear<sup>1</sup>, but it seems that the defence will protect such allegations, provided the basic objective test of fair comment is satisfied in that a person could honestly have made the comment on the facts proved, however prejudiced or obstinate he may have been<sup>2</sup>.

<sup>1</sup> There is authority which implies that the defence of fair comment has no application to such imputations and that justification alone will suffice: *Campbell v Spottiswoode* (1863) 3 B & S 769 at 777 per Cockburn CJ (a jury should be satisfied that such criticism 'was not only honest but also well founded'). See also *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 320, CA, per Fletcher-Moulton LJ, approving the dictum of Lord Atkinson in *Dakhyl v Labouchere* [1908] 2 KB 325n at 329n, HL; followed in *Homing Pigeon Publishing Co Ltd v Racing Pigeon Publishing Co Ltd* (1913) 29 TLR 389. See also *Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292, CA. However it is submitted that such an approach unduly fetters freedom of speech and that, having regard also to the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 10, the authorities cited in note 2 infra are to be preferred. As to the relevance of that convention see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011, HL; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL; and as to the convention see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 158-159; STATUTES vol 44(1) (Reissue) PARAS 1455-1468.

<sup>2</sup> *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109, PC, where the contrary proposition was not considered; *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 253, CA, per Buckley LJ. See also *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516, [1958] 1 WLR 743; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA; *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 45 ALJR 59 (Aust HC). As to the test of what is fair comment see PARA 145 ante.

## UPDATE

### 147 Allegations of dishonesty or dishonourable conduct

NOTES--See *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] All ER (D) 178 (Jan) (newspapers reference to fairness and accuracy were inapt and defence of fair comment was not made out).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(4) FAIR COMMENT/ (iv) Justification and Fair Comment Compared/148. Distinction between fair comment and justification.

## **(iv) Justification and Fair Comment Compared**

### **148. Distinction between fair comment and justification.**

The defence of justification can be raised in the case of both defamatory statements of fact and defamatory comment<sup>1</sup>. However, the defence of fair comment only applies to comment and not to defamatory statements of fact<sup>2</sup>. Where the words complained of contain both defamatory statements of fact and defamatory expressions of opinion, it is essential to plead justification as well as fair comment<sup>3</sup>.

In a defence of justification it is necessary to prove that the defamatory statements of fact in the words complained of are substantially true and that inferences from both fact and comment are true<sup>4</sup>. In a defence of fair comment it is necessary to prove sufficient facts to sustain the comment, that the comment made on those facts is fair and that the comment is made on a matter of public interest<sup>5</sup>. A fair and accurate report of a statement made on a privileged occasion may also be the subject of fair comment even though the statement is inaccurate<sup>6</sup>. Facts subsequent to publication may be relied on to support a defence of justification<sup>7</sup>, but cannot be relied on to support a defence of fair comment<sup>8</sup>.

On a plea of justification the defendant's mental attitude is immaterial because the defence is not defeated by malice<sup>9</sup>. However, proof of malice in the commentator's mind will defeat the plea of fair comment<sup>10</sup>.

If a plea of justification is established, an alternative plea of fair comment need not be investigated<sup>11</sup>.

An unsuccessful plea of justification is admissible in aggravation of damages, but the mere fact that a plea of fair comment fails is inadmissible on this issue<sup>12</sup>.

1 As to the defence of justification see PARA 82 et seq ante.

2 See *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 253, CA; *Dakhyl v Labouchere* [1908] 2 KB 325n, HL; *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 320, CA; *Joynt v Cycle Trade Publishing Co* [1904] 2 KB 292 at 294, CA; *Sutherland v Stopes* [1925] AC 47, HL; *Burton v Board* [1929] 1 KB 301 at 305, CA; and *Campbell v Spottiswoode* (1863) 3 B & S 769, referred to in *Peter Walker & Son Ltd v Hodgson* supra at 254 per Buckley LJ. As to the distinction between comment and imputations as facts see *Davis v Shepstone* (1886) 11 App Cas 187 at 190, PC, per Lord Herschell C. As to what is comment see PARA 138 ante.

3 *Broadway Approvals Ltd v Odhams Press Ltd* [1964] 2 QB 683, [1964] 2 All ER 904n; *Truth (NZ) Ltd v Avery* [1959] NZLR 274.

4 See PARAS 82, 88, 135 ante.

5 See PARA 138 et seq ante.

6 See PARA 142 ante.

7 See PARA 93 ante.

8 See PARA 141 ante.

9 As to malice see PARAS 149-156 post.

10 As to the effect of malice in fair comment see PARA 137 ante.

11 See *Dakhyl v Labouchere* [1908] 2 KB 325n at 327n, HL; *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 317, CA, quoted in *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239 at 251, CA; *Sutherland v Stopes* [1925] AC 47, HL.

12 See PARA 135 note 9 ante.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5) DEFENCES DEFEATED BY MALICE/(i) Malice generally/149. What is malice.

## (5) DEFENCES DEFEATED BY MALICE

### (i) Malice generally

#### 149. What is malice.

Express or actual malice is ill will or spite towards the plaintiff or any indirect or improper motive in the defendant's<sup>1</sup> mind<sup>2</sup> which is his sole or dominant motive for publishing the words complained of<sup>3</sup>. This must be distinguished from legal malice or malice in law which means publication without lawful excuse and does not depend upon the defendant's state of mind<sup>4</sup>. The defences of both fair comment<sup>5</sup> and qualified privilege<sup>6</sup> are defeated by proof that the defendant published the words complained of maliciously. The fact that the defendant did not believe that what he said was true<sup>7</sup> is usually conclusive evidence of malice to rebut the defence of qualified privilege; and in fair comment it is usually conclusive evidence of malice to show that the defendant did not honestly hold the opinion expressed<sup>8</sup>. If a defendant publishes untrue defamatory matter recklessly, without considering or caring whether it is true or not, he is treated as if he knew it to be false; however mere carelessness or impulsiveness or irrationality is not sufficient<sup>9</sup>.

What must ultimately be decided is the defendant's honesty in publishing the words complained of. If express or actual malice is not pleaded and proved by the plaintiff, absence of such malice in the defendant is presumed<sup>10</sup>.

1 This must be qualified by the law as to principal and agent: see PARAS 155-156 post; and AGENCY vol 1 (2008) PARA 71 et seq.

2 See *Angel v HH Bushell & Co Ltd* [1968] 1 QB 813 at 831, [1967] 1 All ER 1018 at 1020, where a defamatory letter was motivated by anger, not by duty or any interest, and a defence of qualified privilege was defeated; *Clark v Molyneux* (1877) 3 QBD 237 at 247, CA; *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 169, CA (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); *Lewis v Mullally* (1953) Times, 3 December (using an occasion of qualified privilege for an improper purpose); *Suzor v Buckingham* 1914 SC 299 (jealousy). Failure to make any apology or retraction of the allegation made is not generally good evidence of malice: *Horrocks v Lowe* [1975] AC 135 at 152, [1974] 1 All ER 662 at 671, HL, per Lord Diplock; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 at 533, [1965] 1 WLR 805 at 814, CA, per Sellers LJ (nor is persistence in a plea of justification by itself evidence of malice: see PARA 152 post). As to motives see *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 444, CA, per Lord Esher MR. See also *Stevens v Sampson* (1879) 5 Ex D 53, CA, where a defendant sent a fair report of legal proceedings to newspapers but was found to have acted maliciously. The verdict for the plaintiff was upheld on appeal. Being actuated by financial considerations is not necessarily evidence of malice: *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL. See also the cases cited in PARA 152 notes 3, 7 post.

3 *Horrocks v Lowe* [1975] AC 135 at 149-151, [1974] 1 All ER 662 at 669-670, HL, per Lord Diplock, dealing with malice in relation to the defence of qualified privilege. It seems that the same principles apply to the defence of fair comment. Malice may still be proved where the defendant's sole or dominant motive for publication was ill will towards the plaintiff or some other improper motive, notwithstanding that he believes that what he said was true, in relation to the defence of qualified privilege, or, it seems, where the opinion expressed was honestly held, in relation to the defence of fair comment, although judges and juries should be slow to infer malice in such a case: see *Horrocks v Lowe* supra at 150 and at 669 per Lord Diplock.

4 See the consideration of *Bromage v Prosser* (1825) 4 B & C 247 in *Clark v Molyneux* (1877) 3 QBD 237 at 247, CA. The words 'falsely and maliciously published', which commonly appear in statements of claim in defamation actions, are an allegation of legal malice, not express or actual malice. Since defamatory words are presumed to be false and their publication is presumed to be without lawful excuse, the words 'falsely and maliciously' are unnecessary: see the *Report of the Faulks Committee on Defamation* (Cmnd 5909) (1975) PARA 143. See also PARA 16 ante.

5 As to the defence of fair comment see PARAS 135-148 ante.

6 As to the defence of qualified privilege see PARAS 109-134 ante.

7 *Horrocks v Lowe* [1975] AC 135 at 150, [1974] 1 All ER 662 at 669, HL, per Lord Diplock; and see PARA 153 post.

8 *Horrocks v Lowe* [1975] AC 135 at 149-151, [1974] 1 All ER 662 at 669-670, HL, per Lord Diplock. As to the application of these dicta to the defence of fair comment see note 3 supra.

9 *Horrocks v Lowe* [1975] AC 135 at 150, [1974] 1 All ER 662 at 669, HL, per Lord Diplock. The only kind of recklessness which destroys privilege is indifference to its truth or falsity: *Horrocks v Lowe* supra at 152-153 and at 671, explaining *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, CA. See also PARA 153 note 2 post.

10 Absence of malice on the defendant's part is otherwise presumed: see *Wright v Woodgate* (1835) 2 Cr M & R 573; and *Jenoure v Delmege* [1891] AC 73, PC.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5) DEFENCES DEFEATED BY MALICE/(i) Malice generally/150. Burden and standard of proof.

## 150. Burden and standard of proof.

If a plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in the statement of claim give particulars of the facts on which he relies in support of the allegation of malice but, if the defendant pleads fair comment on a matter of public interest or that publication was on a privileged occasion and the plaintiff intends to allege the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred<sup>1</sup>. He must satisfy the jury on the balance of probabilities that the defendant acted maliciously<sup>2</sup>. It is unnecessary for the judge in summing up to put each piece of evidence of malice to the jury<sup>3</sup>.

1 See RSC Ord 82 r 3(3); and PARA 195 post.

2 *Clark v Molyneux* (1877) 3 QBD 237, CA; *Jenoure v Delmege* [1891] AC 73, PC.

3 *Boston v WS Bagshaw & Sons* [1966] 2 All ER 906 at 911, [1966] 1 WLR 1126 at 1133, CA, per Lord Denning MR.

## UPDATE

## 150 Burden and standard of proof

TEXT AND NOTE 1--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR').  
See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5)  
DEFENCES DEFEATED BY MALICE/(i) Malice generally/151. Intrinsic evidence.

### 151. Intrinsic evidence.

Excessive language in relation to a matter within a privileged occasion may be evidence of malice. To submit the language used on occasions of qualified privilege to a strict scrutiny and to hold any language which goes beyond the actual exigency of the occasion to be evidence of express malice would greatly limit, if not altogether defeat, the protection afforded by the privilege. There must be something so extreme in the words used as to afford evidence that publication was actuated by an improper motive<sup>1</sup>. A person may use excessive language and yet not be malicious<sup>2</sup>.

The inclusion of defamatory matter unconnected with the duty or interest which gives rise to the privileged occasion may be evidence of malice as to the whole publication<sup>3</sup>.

Where the defence of fair comment is pleaded, the words complained of may also be in such strong language that they are themselves evidence of malice, although strong language will often indicate no more than that the defendant holds strong views<sup>4</sup>.

1 *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495 at 508; *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 172, CA (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); *Adam v Ward* [1917] AC 309, HL; *Lyal v Henderson* 1916 SC (HL) 167 at 175; *AB v XY* 1917 SC 15 at 21; *Hayford v Forrester-Paton* 1927 SC 740 at 756; cf *R v Perry* (1883) 15 Cox CC 169; and *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL (malice not proved).

2 *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 170, CA, per Lord Esher MR (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); *Edmondson v Birch & Co Ltd and Horner* [1907] 1 KB 371 at 381, CA; and see the other cases cited in PARA 243 note 4 post; *Cowles v Potts* (1865) 34 LJQB 247; cf *Cooke v Wildes* (1855) 5 E & B 328; *Fryer v Kinnersley* (1863) 15 CBNS 422.

3 *Adam v Ward* [1917] AC 309, HL; *M'Keogh v O'Brien Moran* [1927] IR 348.

4 See the summing up of Lord Hewart CJ in *Stopes v Sutherland* (1924) 708 Cases on Appeals to the House of Lords 53 at 375.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5)  
DEFENCES DEFEATED BY MALICE/(i) Malice generally/152. Extrinsic evidence.

### 152. Extrinsic evidence.

Extrinsic evidence may be evidence of what the defendant did or said before, or at, or since the publication, so long as it is evidence from which the jury may infer that the publication was malicious<sup>1</sup>. Thus, evidence of other defamatory statements<sup>2</sup> or a previous dispute<sup>3</sup> may be evidence of malice, but the mere fact that a justification is pleaded and fails is not in itself evidence of malice<sup>4</sup>. A mere failure or refusal to apologise or retract is at best tenuous evidence of malice, since it is consistent with a continuing belief in the truth of what was said<sup>5</sup>. Such a failure or refusal will, however, be evidence of malice if persisted in by the defendant after the words complained of have to his knowledge been authoritatively refuted<sup>6</sup>. The mere fact that

the words are false is not evidence of malice, since it is the defendant's state of mind which is in issue<sup>7</sup>.

1 As to directing the jury in relation to subsequent statements see *Hemmings v Gasson* (1858) EB & E 346. For the cases which have been decided on the relevance of the motive for publication to the quantum of damages see PARA 250 et seq post, and the cases cited in PARA 149 note 2 ante. As to matters before publication being evidence of malice see *Simpson v Robinson* (1848) 12 QB 511 (admission by defendant after publication of a previously existing dispute); *Barrett v Long* (1851) 3 HL Cas 395 (earlier publications admissible although statute barred); *Jackson v Adams* (1835) 1 Hodg 78 (writ of inquiry in former suit); *Watt v Longsdon* [1930] 1 KB 130, CA; *Suzor v Buckingham* 1914 SC 299 (jealousy); *Suzor v M'Lachlan* 1914 SC 306 (series of groundless complaints made before publication); *A B v X Y* 1917 SC 15 (refusal to hear explanation); cf *Murray v Wyllie* 1916 SC 356; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL. As to statements and conduct since publication see *Pearson v Lemaitre* (1843) 5 Man & G 700 (evidence may be given which discloses other causes of action but not for purposes of damages). See also CIVIL PROCEDURE vol 11 (2009) PARA 1082.

2 See *Camfield v Bird* (1852) 3 Car & Kir 56. It is not necessary that the statement should be to the same person or actionable: *Mead v Daubigny* (1792) Peake 125. See also PARAS 217 note 5, 219 post.

3 *Simpson v Robinson* (1848) 12 QB 511.

4 *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 at 533, [1965] 1 WLR 805 at 814, CA, per Sellers LJ; see also *Camfield v Bird* (1852) 3 Car & Kir 56; *Caulfield v Whitworth* (1868) 18 LT 527; and note 3 supra; and see PARA 254 post. As to costs where the jury finds for the plaintiff on the plea of justification and for the defendant on the issue of express malice see *Brown v Houston* [1901] 2 KB 855, CA. See also PARA 247 post.

5 *Horrocks v Lowe* [1975] AC 135 at 152, [1974] 1 All ER 662 at 671, HL, per Lord Diplock; *Hemmings v Gasson* (1858) EB & E 346; *Couper v Lord Balfour of Burleigh* 1913 SC 492, where refusal to apologise for having made charges proved on inquiry to have been without foundation was held not necessarily to be evidence of malice; *Lionel Barber & Co v Deutsch Bank (Berlin) London Agency* [1919] AC 304 at 311, 329, 333, HL.

6 *Sevenoaks v Latimer* (1919) 54 ILT 11 (persistence in charges at trial after evidence showing that they could not be true) See also note 4 supra. As to damages see PARAS 252-253 post.

7 *Caulfield v Whitworth* (1868) 18 LT 527; cf *Palmer v Hummerston* (1883) Cab & El 36. In contrast, proof that the defendant knew that part was false is clear evidence of malice: *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL; *Blagg v Sturt* (1846) 10 QB 899. As to the distinction between a statement made by a mere mistake and one wilfully false see *Hancock v Case* (1862) 2 F & F 711.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5) DEFENCES DEFEATED BY MALICE/(ii) Malice in relation to Qualified Privilege/153. Effect of grounds of belief and sources of information.

## **(ii) Malice in relation to Qualified Privilege**

### **153. Effect of grounds of belief and sources of information.**

It is not enough for the plaintiff to show that, in making a statement on an occasion of qualified privilege<sup>1</sup>, the defendant was careless or impulsive or irrational in arriving at a positive belief that the statement is true<sup>2</sup>. Nor is it sufficient to show that he was improvident, credulous or stupid, or that he did not do or say what a man of the world would do or say on such an occasion<sup>3</sup>. If the defendant made the statement honestly believing it to be true, he will not lose the protection arising from the occasion because he had no reasonable grounds for his belief<sup>4</sup>. At the same time, the defendant's sources of information are likely to be material to the question of whether he did honestly believe this statement; for instance, he may have received his information from a person of bad character or of known ill will towards the plaintiff.

1 As to occasions of qualified privilege see PARAS 113-120 ante.



2 These illustrations are taken from *Clark v Molyneux* (1877) 3 QBD 237, CA, per Cotton, Bramwell and Brett LJ.

3 *Horrocks v Lowe* [1975] AC 135 at 150, [1974] 1 All ER 662 at 669, HL, per Lord Diplock; and see PARA 149 ante.

4 Gross and unreasoning prejudice will not even suffice where the defendant believes the truth of what he said: *Horrocks v Lowe* [1975] AC 135 at 146, [1974] 1 All ER 662 at 666, HL, per Viscount Dilhorne. See also *Clark v Molyneux* (1877) 3 QBD 237, CA; *Collins v Cooper* (1902) 19 TLR 118, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5) DEFENCES DEFEATED BY MALICE/(ii) Malice in relation to Qualified Privilege/154. Effect of duty to communicate false statements or rumours.

#### **154. Effect of duty to communicate false statements or rumours.**

As a rule it is sufficient for the plaintiff to show that the defendant made the statement without honestly believing it to be true, for there is no better evidence of actual malice than the repetition of a defamatory statement by a person who does not believe it. There may nevertheless be exceptional occasions when a person is under a duty to pass on, without indorsing, defamatory reports made by some other person, even if they contain matter defamatory of the plaintiff which the person whose duty it is to communicate it knows or believes to be untrue. In such a case, the person making the communication is not malicious, despite an absence of honest belief<sup>1</sup>, unless it could be shown that his dominant motive was spite or ill will or otherwise improper.

1 *Horrocks v Lowe* [1975] AC 135 at 150, [1974] 1 All ER 662 at 669, HL, per Lord Diplock. The question 'did the defendant honestly believe the statement to be true?' would not, if put to the jury, meet the case: see *Clark v Molyneux* (1877) 3 QBD 237 at 244, CA, per Bramwell LJ, and at 249 per Cotton LJ. Cf *Botterill v Whytehead* (1879) 41 LT 588 at 590; *Vanbergen v Bosshard* (4 April 1927, unreported) cited in Gatley on Libel and Slander (8th Edn) PARA 567. In such cases, or in the converse case where the defendant may be malicious notwithstanding his belief in the truth of the words, the issue may more properly be left to the jury: 'was the defendant malicious?'; see *Watt v Longsdon* [1930] 1 KB 130 at 154-155, CA, per Greer LJ.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5) DEFENCES DEFEATED BY MALICE/(ii) Malice in relation to Qualified Privilege/155. Co-defendants, agents and vicarious liability.

#### **155. Co-defendants, agents and vicarious liability.**

Where there is more than one publisher of defamatory matter on an occasion of qualified privilege, each defendant has a separate privilege and one defendant's malice will not attach to any non-malicious co-defendant<sup>1</sup>. Whether a defendant has an independent or a derivative privilege, the plaintiff must prove malice against him personally to defeat the privilege, except where a defendant is vicariously liable as principal for his agent's malice<sup>2</sup>. An agent is not liable for his principal's malice<sup>3</sup>.

1 *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA; approving *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662; and overruling *Smith v Streatfeild* [1913] 3 KB 764; and not following dicta in *Adam v Ward* [1917] AC 309, HL. The malice of one partner does not defeat the independent privilege of his non-malicious partner where there is joint publication of a defamatory letter on a privileged occasion: *Meekins v Henson* [1964] 1 QB 472, [1962] 1 All ER 899, following *Longdon-Griffiths v Smith* supra.

2 *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 266, [1964] 3 All ER 406 at 413, CA, per Harman LJ, and at 269-271 and 415-416 per Davies LJ, referring to the general principle of law as to a principal's liability for his agent's act stated in *Fitzsimons v Duncan and Kemp & Co* [1908] 2 IR 483. See also *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, CA; *Osborn v Thomas Boulter & Son* [1930] 2 KB 226, CA; and *Bryanston Finance Ltd v de Vries* [1975] QB 703, [1975] 2 All ER 609, CA. It is not clear whether a company is infected by an employee's malice where the employee maliciously defames another company employee in an internal confidential report which is published on a privileged occasion: see *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 895, [1977] 3 All ER 677 at 686, CA, obiter per Lord Denning MR, and at 901 and 693 obiter per Stephenson LJ. However, it appears that in these circumstances the malice of company employees supplying information to the employee who, without malice, compiles the report will not infect the company unless the former contemplated the republication of the information given: *Riddick v Thames Board Mills Ltd* supra at 900 and at 693 per Stephenson LJ and at 908-910 and 689-701 per Waller LJ.

3 As to agent and principal see also PARA 156 post; and AGENCY vol 1 (2008) PARA 71 et seq.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(5) DEFENCES DEFEATED BY MALICE/(iii) Malice in relation to Fair Comment/156. Co-defendants, agents and vicarious liability.

### **(iii) Malice in relation to Fair Comment**

#### **156. Co-defendants, agents and vicarious liability.**

It seems that a non-malicious defendant who has published a defamatory comment is entitled to rely on the defence of fair comment although the person who contributed the comment<sup>1</sup> acted maliciously<sup>2</sup>. However, an innocent principal will be vicariously liable for his agent's malice<sup>3</sup>, but it seems that he will not be liable for an independent contractor's malice<sup>4</sup>. An agent is not liable for his principal's malice<sup>5</sup>. In recent times the courts have been unwilling to restrict the defence of fair comment<sup>6</sup>.

1 As to vicarious liability and joint tortfeasors see TORT.

2 See *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 264-265, [1964] 3 All ER 406 at 412, CA, obiter per Lord Denning MR, but where the contrary view was expressed at 269 and 415 obiter per Davies LJ. The former dictum was followed in *McLeod v Jones* [1977] 1 NZLR 441 at 444 and recommended by the *Report of the Faulks Committee on Defamation* (Cmd 5909) (1975) PARAS 259-261. See also *Telnikoff v Matusevitch* [1992] 2 AC 343, [1991] 4 All ER 817, HL, not following *Cherneskey v Armadale Publishers Ltd and King* [1978] 6 WWR 618 (Can SC); *Hennessy v Wright (No 2)* (1890) 24 QBD 445n at 447, CA, per Lord Esher MR; *Lyon v Daily Telegraph Ltd* [1943] KB 746 at 752, [1943] 2 All ER 316 at 319, CA. It is likely that the dicta in *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL (as to which see PARA 149 note 8 ante), will apply in relation to what is malice in the context of the defence of fair comment. As to the related question of whether each defendant must show that the facts were known to him see PARA 141 ante.

3 Ie on the basis of 'let the master answer': *Gros v Crook* (1969) 113 Sol Jo 408. For the doctrine generally see *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423, PC.

4 *Gros v Crook* (1969) 113 Sol Jo 408 at 409 obiter per Blain J, citing *Smith v Streatfeild* [1913] 3 KB 764; *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662; *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191, CA.

5 *Egger v Viscount Chelmsford* [1965] 1 QB 248 at 261, [1964] 3 All ER 406 at 410, CA, per Lord Denning MR, and at 266-267 and 413 per Harman LJ.

6 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 170, [1968] 1 All ER 497 at 503, CA, per Lord Denning MR; *McDonald's Corp'n v Steel* [1995] 3 All ER 615 at 622, CA, per Neill LJ.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(6) THE STATUTORY DEFENCE FOR PRINTERS, DISTRIBUTORS AND OTHER SECONDARY PUBLISHERS/157. Responsibility for publication.

## **(6) THE STATUTORY DEFENCE FOR PRINTERS, DISTRIBUTORS AND OTHER SECONDARY PUBLISHERS**

### **157. Responsibility for publication.**

In defamation proceedings a person has a defence if he shows that:

- 82 (1) he was not the author, editor or publisher<sup>1</sup> of the statement<sup>2</sup> complained of;
- 83 (2) he took reasonable care in relation to its publication<sup>3</sup>; and
- 84 (3) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement<sup>4</sup>.

In determining for these purposes whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard must be had to:

- 85 (a) the extent of his responsibility for the content of the statement or the decision to publish it;
- 86 (b) the nature or circumstances of the publication; and
- 87 (c) the previous conduct or character of the author, editor or publisher<sup>5</sup>.

Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it<sup>6</sup>.

1 For the meaning of 'author', 'editor' and 'publisher' see PARA 158 post.

2 For the meaning of 'statement' see PARA 10 note 1 ante.

3 For the meaning of 'publication' and 'publish' see PARA 100 note 2 ante.

4 Defamation Act 1996 s 1(1). This statutory defence does not apply to any cause of action which arose before 4 September 1996: see ss 1(6), 19(2).

5 Ibid s 1(5). For authorities on the common law defence of innocent dissemination, relevant to the interpretation of the statutory defence, see PARA 159 post.

6 Ibid s 1(4).

### **UPDATE**

#### **157 Responsibility for publication**

TEXT AND NOTES--A person who makes statements by electronic means is not liable for damages or any other pecuniary remedy if his activities are confined to mere conduits, caching and hosting: see the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, regs 17-20. When considering immunity relating to hosting conferred by reg 19, the question is whether the information service in question consists only of, and is limited to, storage of information: *Kaschke v Gray* [2010] EWHC 690 (QB), [2010] All ER (D) 21 (Apr).

NOTE 4--An Internet provider who fails to remove a posting on its news server upon becoming aware of its defamatory contents cannot satisfy the requirements of the 1996 Act s 1(1)(b) and (c), and therefore the defence under s 1 is not available to it: *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342. For an Internet provider to be held liable for defamatory publication there has to be knowing involvement in the publication process in the relevant words: *Bunt v Tilley* [2006] EWHC 407 (QB), [2006] 3 All ER 336.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(6) THE STATUTORY DEFENCE FOR PRINTERS, DISTRIBUTORS AND OTHER SECONDARY PUBLISHERS/158. Authors, editors and publishers.

### **158. Authors, editors and publishers.**

For the purposes of the statutory defence for printers, distributors and other secondary publishers<sup>1</sup>, 'author', 'editor' and 'publisher' have the following meanings<sup>2</sup>. 'Author' means the originator of the statement<sup>3</sup>, but does not include a person who did not intend that his statement be published at all<sup>4</sup>. 'Editor' means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it<sup>5</sup>. 'Publisher' means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business<sup>6</sup>. A person is not, however, to be considered the author, editor or publisher of a statement if he is only involved:

- 88 (1) in printing, producing, distributing or selling printed material containing the statement;
- 89 (2) in processing, making copies of, distributing, exhibiting or selling a film or sound recording<sup>7</sup> containing the statement;
- 90 (3) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
- 91 (4) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
- 92 (5) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control<sup>8</sup>.

In a case not within heads (1) to (5) above, the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement<sup>9</sup>.

1    Ie the defence under the Defamation Act 1996 s 1: see PARA 157 ante.

2    Ibid s 1(2).

3    For the meaning of 'statement' see PARA 10 note 1 ante.

4    Defamation Act 1996 s 1(2)(a). For the meaning of 'publish' and 'publication' see PARA 100 note 2 ante.

5    Ibid s 1(2)(b).

6 Ibid s 1(2)(c).

7 For these purposes, 'film' means a recording on any medium from which a moving image may by any means be produced; and 'sound recording' means (1) a recording of sounds, from which the sounds may be reproduced; or (2) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or any part may be produced, regardless in either case of the medium on which the recording is made or the method by which the sounds are reproduced or produced: Copyright, Designs and Patents Act 1988 s 5(1) (applied by the Defamation Act 1996 s 1(3)(b)).

8 Defamation Act 1996 s 1(3)(a)-(e).

9 Ibid s 1(3). These provisions do not apply to any cause of action which arose before 4 September 1996: see ss 1(6), 19(2).

## UPDATE

### 158 Authors, editors and publishers

NOTES 6-8--See *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342 (Internet service provider which received and stored a posting on its news server, and transmitted the posting to its subscribers who wished to download it, is a publisher at common law but not for the purposes of the 1996 Act s 1(2), (3)). See also *Metropolitan International School Ltd v Designtecnica Corp*n [2009] EWHC 1765 (QB), [2009] All ER (D) 263 (Jul) (Internet search engine not characterised as publisher as search performed automatically, nor could it be held to have acquiesced to publication of libel).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(6) THE STATUTORY DEFENCE FOR PRINTERS, DISTRIBUTORS AND OTHER SECONDARY PUBLISHERS/159. The common law defence of innocent dissemination.

### 159. The common law defence of innocent dissemination.

Though largely superseded by the statutory defence under the Defamation Act 1996, the common law defence of innocent dissemination remains part of the law, and decisions made under it provide guidance as to the interpretation of the statute. At common law, it is a defence for a person who is not the author, printer or main publisher to show that he disseminated a defamatory statement innocently. For instance, a postman or porter who in the ordinary course of his duty delivers a letter without being aware that its contents are defamatory is not liable<sup>1</sup>. Again, a librarian or a bookseller who in the ordinary course of business circulates or sells a book containing a libel without knowing, and without negligence in not knowing, that it is likely to contain defamatory matter is not liable<sup>2</sup>. It is the same in the case of a news vendor who in the ordinary course of his business sells a newspaper without knowing, and without negligence in not knowing, that it contains a libel<sup>3</sup>.

In these cases the burden is on the person who, not being the author, printer or main publisher, passes on or otherwise disseminates a defamatory document to prove that he did not know that the document contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know and had no ground for supposing that the document was likely to contain libellous matter<sup>4</sup>.

1 *Day v Bream* (1837) 2 Mood & R 54.

2 *Weldon v Times Book Co Ltd* (1911) 28 TLR 143, CA.

3 *Sun Life Assurance Co of Canada v WH Smith & Son Ltd* (1933) 150 LT 211, CA; see also *Emmens v Pottle* (1885) 16 QBD 354, CA.

4 See *Emmens v Pottle* (1885) 16 QBD 354 at 356-357, CA (the defendants were prima facie liable; they handed to other people a newspaper in which there was a libel on the plaintiff; this called upon the defendants to show some circumstances which absolved them from liability, not by way of privilege, but facts which showed that they did not publish the libel; the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel; that being so, the defendants were not liable for the libel); and see *Weld-Blundell v Stephens* [1920] AC 956 at 972, HL, on the duty to take care. See also *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, CA; and *Weldon v Times Book Co Ltd* (1911) 28 TLR 143, CA (circulating libraries); *Haynes v De Beck* (1914) 31 TLR 115; *Bottomley v FW Woolworth & Co Ltd* (1932) 48 TLR 521, CA; *Sun Life Assurance Co of Canada v WH Smith & Son Ltd* (1933) 150 LT 211, CA (distributors of newspapers or periodicals). *Emmens v Pottle* supra was followed in *Ridgway v Smith & Son* (1890) 6 TLR 275, DC; *Mallon v WH Smith & Son* (1893) 9 TLR 621; and *Martin v Trustees of British Museum and Thompson* (1894) 10 TLR 338. See also *Bradstreets British Ltd v Mitchell and Carapanayoti & Co Ltd* [1933] Ch 190. In *Haynes v De Beck* (1914) 31 TLR 115, the plaintiff was deprived of costs. As to putting the word 'Private' on a letter and thus controlling the mode of dealing with it see PARA 63 note 1 ante.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(7) THE STATUTORY DEFENCE OF OFFER OF AMENDS/160. Offer to make amends.

## **(7) THE STATUTORY DEFENCE OF OFFER OF AMENDS**

### **160. Offer to make amends.**

A person who has published<sup>1</sup> a statement<sup>2</sup> alleged to be defamatory of another may offer to make amends<sup>3</sup>. The offer may be in relation to the statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys ('a qualified offer')<sup>4</sup>.

An offer to make amends:

- 93 (1) must be in writing;
- 94 (2) must be expressed to be an offer to make amends under the relevant provision<sup>5</sup> of the Defamation Act 1996; and
- 95 (3) must state whether it is a qualified offer and, if so, set out the defamatory meaning in relation to which it is made<sup>6</sup>.

Such an offer to make amends is an offer:

- 96 (a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party;
- 97 (b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances; and
- 98 (c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable<sup>7</sup>.

The fact that the offer is accompanied by an offer to take specific steps does not affect the fact that an offer to make amends under these provisions is an offer to do all the things mentioned in heads (a) to (c) above<sup>8</sup>.

Such an offer to make amends may not be made by a person after serving a defence in defamation proceedings brought against him by the aggrieved party in respect of the publication in question<sup>9</sup>. It may be withdrawn before it is accepted; and a renewal of an offer which has been withdrawn is treated as a new offer<sup>10</sup>.

- 1 For the meaning of 'publish' and 'publication' see PARA 100 note 2 ante.
- 2 For the meaning of 'statement' see PARA 10 note 1 ante.
- 3 Defamation Act 1996 s 2(1). At the date at which this volume states the law, s 2 had not been brought into force.
- 4 Ibid s 2(2); and see note 3 supra.
- 5 Ibid s 2(2); see the text and notes 1-4 supra, 6-10 infra.
- 6 Ibid s 2(3); and see note 3 supra.
- 7 Ibid s 2(4)(a)-(c); and see note 3 supra.
- 8 Ibid s 2(4); and see note 3 supra.
- 9 Ibid s 2(5); and see note 3 supra.
- 10 Ibid s 2(6); and see note 3 supra.

## UPDATE

### 160 Offer to make amends

NOTE 3--1996 Act s 2 in force 28 February 2000: SI 2000/222.

NOTE 4--The offer is not valid unless the alleged defamer concedes that the statement is in fact defamatory: *Club la Costa (UK) plc v Gebhard* [2008] EWHC 2552 (QB), [2008] All ER (D) 243 (Oct).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(7) THE STATUTORY DEFENCE OF OFFER OF AMENDS/161. Accepting an offer to make amends.

### 161. Accepting an offer to make amends.

If an offer to make amends<sup>1</sup> is accepted by the aggrieved party, the party accepting the offer may not bring or continue defamation proceedings in respect of the publication<sup>2</sup> concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows<sup>3</sup>. If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed<sup>4</sup>. If, however, the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer may take such steps as he thinks appropriate, and may in particular:

- 99 (1) make the correction and apology by a statement in open court in terms approved by the court; and
- 100 (2) give an undertaking to the court as to the manner of their publication<sup>5</sup>.

If the parties do not agree on the amount to be paid by way of compensation, it is to be determined by the court on the same principles as damages in defamation proceedings<sup>6</sup>. The court must take account of any steps taken in fulfilment of the offer and, so far as not agreed between the parties, of the suitability of the correction, the sufficiency of the apology and

whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly<sup>7</sup>.

If the parties do not agree on the amount to be paid by way of costs, it must be determined by the court on the same principles as costs awarded in court proceedings<sup>8</sup>.

Proceedings under these provisions are to be heard and determined without a jury<sup>9</sup>.

<sup>1</sup> See under the Defamation Act 1996 s 2: see PARA 160 ante. At the date at which this volume states the law, s 2 had not been brought into force.

<sup>2</sup> For the meaning of 'publication' see PARA 100 note 2 ante.

<sup>3</sup> Defamation Act 1996 s 3(1), (2). At the date at which this volume states the law, s 3 had not been brought into force.

<sup>4</sup> Ibid s 3(3); and see note 3 supra.

<sup>5</sup> Ibid s 3(4); and see note 3 supra.

<sup>6</sup> Ibid s 3(5); and see note 3 supra. As to damages see PARA 248 et seq post.

<sup>7</sup> Ibid s 3(5); and see note 3 supra.

<sup>8</sup> Ibid s 3(6); and see note 3 supra. As to costs see PARA 247 post.

<sup>9</sup> Ibid s 3(10); and see note 3 supra.

## UPDATE

### 161 Accepting an offer to make amends

NOTE 2--See *Warren v Random House Group Ltd* [2008] EWCA Civ 834, [2009] QB 600, [2009] 2 All ER 245 (exceptional circumstances required for defendant to resile from accepted offer of amends). See *Tesco Stores Ltd v Guardian News & Media Ltd* [2009] EMLR 90 (required to accept or reject offer of amends within reasonable time).

NOTE 3--1996 Act s 3(1)-(8), (10) in force 28 February 2000: SI 2000/222.

NOTES 6, 7--Guidance has been given on the factors to be considered when determining an award of compensation under the 1996 Act s 3(5): *Abu v MGN Ltd* [2002] EWHC 2345 (QB), [2003] 2 All ER 864. See also *Nail v News Group Newspapers Ltd; Nail v Jones* [2004] EWCA Civ 1708, [2004] All ER (D) 326 (Dec) (substantial mitigation of damages following acceptance of offer of amends); *Vellu v Mazrekaj* [2006] EWHC 1710 (QB), [2007] 1 WLR 495 (distress to claimant real, lasting and severe).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(7) THE STATUTORY DEFENCE OF OFFER OF AMENDS/162. Effect of acceptance on third parties.

### 162. Effect of acceptance on third parties.

The acceptance of an offer by one person to make amends<sup>1</sup> does not affect any cause of action against another person in respect of the same publication<sup>2</sup>, except that, for the purposes of the Civil Liability (Contribution) Act 1978:

- 101 (1) the amount of compensation paid under the offer must be treated as paid in bona fide settlement or compromise of the claim; and



102 (2) where another person is liable in respect of the same damage, whether jointly or otherwise, the person whose offer to make amends was accepted is not required to pay by virtue of any contribution<sup>3</sup> a greater amount than the amount of the compensation payable in pursuance of the offer<sup>4</sup>.

1     Ile under the Defamation Act 1996 s 2: see PARA 160 ante. At the date at which this volume states the law, s 2 had not been brought into force.

2     For the meaning of 'publication' see PARA 100 note 2 ante.

3     Ile under the Civil Liability (Contribution) Act 1978 s 1: see TORT vol 45(2) (Reissue) PARAS 349-351.

4     Defamation Act 1996 s 3(7), (8). In relation to Scotland see s 3(9). At the date at which this volume states the law, s 3 had not been brought into force.

## UPDATE

### 162 Effect of acceptance on third parties

NOTE 1--1996 Act s 2 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(7) THE STATUTORY DEFENCE OF OFFER OF AMENDS/163. Failure to accept offer to make amends.

### 163. Failure to accept offer to make amends.

If an offer to make amends<sup>1</sup>, duly made and not withdrawn, is not accepted by the aggrieved party, the following provisions apply<sup>2</sup>. The fact that the offer was made is a defence to defamation proceedings in respect of the publication<sup>3</sup> in question by that party against the person making the offer, but a qualified offer<sup>4</sup> is only a defence in respect of the meaning to which the offer related<sup>5</sup>.

There is, however, no such defence if the person by whom the offer was made knew or had reason to believe that the statement<sup>6</sup> complained of:

103 (1) referred to the aggrieved party or was likely to be understood as referring to him; and

104 (2) was both false and defamatory of that party,

but it is to be presumed until the contrary is shown that he did not know and had no reason to believe that was the case<sup>7</sup>.

The person who made the offer need not rely on it by way of defence, but if he does he may not rely on any other defence<sup>8</sup>.

The offer may be relied on in mitigation of damages whether or not it was relied on as a defence<sup>9</sup>.

1     Ile under the Defamation Act 1996 s 2: see PARA 160 ante. At the date at which this volume states the law, s 2 had not been brought into force.

2     Ibid s 4(1). At the date at which this volume states the law, s 4 had not been brought into force.

3     For the meaning of 'publication' see PARA 100 note 2 ante.

- 4 For the meaning of 'qualified offer' see PARA 160 ante.
- 5 Defamation Act 1996 s 4(2); and see note 2 supra.
- 6 For the meaning of 'statement' see PARA 10 note 1 ante.
- 7 Defamation Act 1996 s 4(3); and see note 2 supra.
- 8 Ibid s 4(4). If the offer was a qualified offer, this applies only in respect of the meaning to which the offer related: s 4(4). As to commencement of these provisions see note 2 supra.
- 9 Ibid s 4(5); and see note 2 supra. As to mitigation of damages see PARAS 237, 260 et seq post.

## UPDATE

### 163 Failure to accept offer to make amends

NOTE 1--1996 Act s 2 in force 28 February 2000: SI 2000/222.

NOTE 7--Words 'had reason to believe' in s 4(3) incorporated recklessness: *Milne v Express Newspapers plc* [2004] EWCA Civ 664, [2005] 1 WLR 772.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(7) THE STATUTORY DEFENCE OF OFFER OF AMENDS/164. Statutory defence of apology and payment into court.

### 164. Statutory defence of apology and payment into court.

In an action for a libel contained in a public newspaper<sup>1</sup> or other periodical publication<sup>2</sup>, the defendant may<sup>3</sup> plead (1) that the libel was inserted in it without actual malice and without gross negligence; and (2) that before action, or at the earliest opportunity afterwards, he inserted in it a full apology<sup>4</sup> for the libel, or, if the newspaper or periodical publication in which it appeared was ordinarily published at intervals exceeding one week, he had offered to publish the apology in any newspaper or periodical to be selected by the plaintiff<sup>5</sup>. However, the defendant may not plead such a defence without at the same time making a payment of money into court by way of amends; and every such defence so pleaded without payment of money into court is deemed, and may be treated by the plaintiff as, a nullity<sup>6</sup>. In these cases the fact that money has been paid into court may be pleaded<sup>7</sup>, but it has been held to be a contempt of court on the defendant's part to publish before the trial a statement that a particular sum has been paid by his solicitor to the plaintiff's solicitor, since the publication of such a statement is calculated to prejudice the fair trial of the action<sup>8</sup>. The plaintiff may reply generally to this defence denying the whole of it<sup>9</sup>.

This defence still exists, but has fallen wholly into disuse, being replaced by the statutory defence of offer of amends<sup>10</sup> and the modern practice of payment into court<sup>11</sup> together with a published apology or offer of apology if the defendant so elects<sup>12</sup>.

1 Cf the meaning of 'newspaper' in the Newspaper and Libel Registration Act 1881: see PARA 293 note 1 post.

2 'Periodical publication' means a work which comes out from time to time and is miscellaneous in its articles: see *Brown v Cooke* (1846) 16 LJ Ch 140 at 142 per Shadwell V-C.

3 See, however, the text and notes 10-12 infra.

4 'Full apology' means an apology not merely sufficient in its terms, but inserted in a proper manner as to type and position: *Lafone v Smith* (1858) 3 H & N 735. An offer of apology is admissible in evidence in mitigation of damages: see the Libel Act 1843 s 1; and PARA 265 post.

5 See *ibid* s 2.

6 See the Libel Act 1845 s 2.

7 RSC Ord 82 r 4(2) provides that where a party pleads the defence provided for by the Libel Act 1843 s 2, RSC Ord 22 r 7 does not apply. Order 22 r 7 provides that no statement of the fact that money has been paid into court under the preceding rules of Ord 22 may be inserted in the pleadings, and no communication of that fact may, at the trial of any action, be made to the judge or jury until all questions of liability and amount of debt or damages have been decided. If a defendant denies part and admits part of the meaning alleged and pleads the Libel Act 1843 s 2, with a payment into court, he ought to say to what part the payment applies: *Mackay v Manchester Press Co* (1889) 54 JP 22, DC.

8 *R v Wealdstone News and Harrow News (Editor, Printer and Publisher)* (1925) 41 TLR 508.

9 Libel Act 1843 s 2.

10 *le* under the Defamation Act 1996 ss 2-4: see PARAS 160-163 ante. At the date at which this volume states the law, ss 2-4 had not been brought into force.

11 As to payment into court see PARA 201 post; and CIVIL PROCEDURE.

12 As to the practice of offering an apology, and its effect as a mitigation of damages, see PARA 265 post.

## UPDATE

### 164 Statutory defence of apology and payment into court

TEXT AND NOTE 7--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 10--1996 Act ss 2, 3(1)-(8), (10), 4 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(8) LEAVE AND LICENCE/165. Leave and licence.

## (8) LEAVE AND LICENCE

### 165. Leave and licence.

It is a defence<sup>1</sup> to an action for libel or slander for the defendant to plead<sup>2</sup> and prove that the plaintiff has authorised or assented to<sup>3</sup> the publication of the words complained of<sup>4</sup>. The defence is based on the maxim *volenti non fit injuria*<sup>5</sup> by which no act is actionable as a tort<sup>6</sup> at the suit of any person who has expressly or impliedly assented to it<sup>7</sup>.

1 *Moore v News of the World Ltd* [1972] 1 QB 441, [1972] 1 All ER 915, CA; *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA; *Burnett v Greig* (1967) Times, 23 February; *Cookson v Harewood* [1932] 2 KB 478n, CA.

2 The defence must be pleaded: *James v Wellington City* [1972] NZLR 978.

3 See *Monson v Tussauds Ltd*, *Monson v Louis Tussaud* [1894] 1 QB 671 at 697, CA, per Davey LJ.

4 It is probable that a publication would be actionable to the extent by which it exceeds the terms of any consent given: see *Cook v Ward* (1830) 4 Moo & P 99.

5 *Monson v Tussauds Ltd, Monson v Louis Tussaud* [1894] 1 QB 671, CA; *Chapman v Lord Ellesmere* [1932] 2 KB 431 at 463-465, CA, per Slesser LJ. As to the doctrine of volenti non fit injuria generally see TORT vol 45(2) (Reissue) PARA 375.

6 The doctrine applies equally to negligence: see *Smith v Baker & Sons* [1891] AC 325, HL; and NEGLIGENCE vol 78 (2010) PARAS 69-72.

7 This definition of the doctrine was adopted in *Chapman v Lord Ellesmere* [1932] 2 KB 431, CA, and is taken from Salmond on Torts (7th Edn) p 58.

## UPDATE

### 165 Leave and licence

NOTE 4--An employee is deemed to have assented to the republication of allegedly defamatory material in the course of a contractual disciplinary procedure by his acceptance of the terms of service and the disciplinary code in his contract of employment: *Friend v Civil Aviation Authority* [2001] EWCA Civ 1204, [2002] ICR 525.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(8) LEAVE AND LICENCE/166. Leave and licence and qualified privilege.

### 166. Leave and licence and qualified privilege.

In certain circumstances a libel or slander published with the plaintiff's assent will also be protected by the defence of qualified privilege, such as where the plaintiff invites or procures the publication to give himself a cause of action<sup>1</sup> or where the defamatory statement originated elsewhere and was repeated at the plaintiff's request<sup>2</sup>. In such cases the defendant may plead both qualified privilege and leave and licence.

1 *King v Waring* (1803) 5 Esp 13 (reference as to an employee's character); *Rogers v Clifton* (1803) 3 Bos & P 587; *Duke of Brunswick v Harmer* (1849) 14 QB 185. See also *Weatherston v Hawkins* (1786) 1 Term Rep 110 (defendant was 'entrapped' into publishing the libel).

2 *Smith v Mathews* (1831) 1 Mood & R 151; explained in *Griffiths v Lewis* (1845) 7 QB 61. See also *Warr v Jolly* (1834) 6 C & P 497; *Kine v Sewell* (1838) 3 M & W 297 (decided in the defendant's favour on qualified privilege).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/2. DEFENCES/(9) LIMITATION/167. Limitation period applicable to defamation claims.

## (9) LIMITATION

### 167. Limitation period applicable to defamation claims.

The time limit applicable to actions for libel or slander, slander of title, slander of goods or malicious falsehood is one year from the date on which the cause of action accrued<sup>1</sup> or, in the case of a person under a disability, one year from the date on which he ceased to be under a disability<sup>2</sup>.

If it appears to the court<sup>3</sup> that it would be equitable to allow an action to proceed having regard to the degree to which:

- 105 (1) the operation of the statutory time limit<sup>4</sup> prejudices the plaintiff or any person whom he represents; and  
 106 (2) any decision of the court under this provision would prejudice the defendant or any person whom he represents,

the court may direct that that time limit is not to apply to the action or is not to apply to any specified cause of action to which the action relates<sup>5</sup>. In so acting the court must have regard to all the circumstances of the case and in particular to:

- 107 (a) the length of, and the reasons for, the delay on the part of the plaintiff<sup>6</sup>;  
 108 (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the statutory limitation period<sup>7</sup>;  
 11  
 18. (i) the date on which any such facts did become known to him; and  
 19. (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and  
 12  
 109 (c) the extent to which, having regard to the delay, relevant evidence is likely to be unavailable, or to be less cogent than if the action had been brought within the statutory limitation period<sup>8</sup>.

The expiry of this statutory time limit is no bar to equitable relief<sup>9</sup>.

The above provisions apply only to causes of action arising after 4 September 1996<sup>10</sup>.

1 See the Limitation Act 1980 s 4A (added by the Administration of Justice Act 1985 s 57(2); substituted by the Defamation Act 1996 s 5(1), (2)).

2 See the Limitation Act 1980 s 28(4A) (added by the Administration of Justice Act 1985 s 57(3); substituted by the Defamation Act 1996 s 5(1), (3)).

3 For these purposes, 'the court' means the court in which the action has been brought: Limitation Act 1980 s 32A(4) (s 32A added by the Administration of Justice Act 1985 s 57(4); substituted by the Defamation Act 1996 s 5(1), (4)).

4 Ie the operation of the Limitation Act 1980 s 4A (as substituted): see the text and note 1 supra.

5 Ibid s 32A(1) (as substituted: see note 3 supra).

6 In the case of an action for slander of title, slander of goods or other malicious falsehood brought by a personal representative, the references in ibid s 32A(2) (as substituted: see note 3 supra) (see heads (a)-(c) in the text) to the plaintiff are to be construed as including the deceased person to whom the cause of action accrued and any previous personal representative of that person; and nothing in s 28(3) (death of person under a disability to whom right of action of deceased person under disability has accrued: see LIMITATION PERIODS vol 68 (2008) PARA 1171) is to be construed as affecting the court's discretion under s 32A (as so substituted): s 32A(3) (as so substituted).

7 Ie the period mentioned in ibid s 4A (as substituted): see the text and note 1 supra.

8 Ibid s 32A(2) (as substituted: see note 3 supra). See also note 6 supra. 'Facts relevant to the cause of the action' do not extend to facts tending to rebut any possible defences to the libel action: see *C v Mirror Group Newspapers* [1997] 1 WLR 131, CA (decided on the Limitation Act 1980 s 32A as originally added).

9 See the Limitation Act 1980 s 36(1)(a) (added by the Administration of Justice Act 1985 s 57(5); substituted by the Defamation Act 1996 s 5(1), (5)). As to amendment of pleadings in a breach of contract case so as to plead libel outside the limitation period see the Limitation Act 1980 s 35; *Lloyds Bank plc v Rogers* (1997) Times, 24 March, CA; and LIMITATION PERIODS.

10 See the Defamation Act 1996 ss 5(6), 19(2). As to the limitation of actions in Northern Ireland see the Limitation (Northern Ireland) Order 1989, SI 1989/1339, arts 6, 48, 51 (arts 6, 48 amended, and art 51 substituted, by the Defamation Act 1996 s 6).

## UPDATE

### 167 Limitation period applicable to defamation claims

NOTE 1--As the cause of action in relation to a defamation claim accrues on publication, it is irrelevant for limitation purposes whether an author's identity becomes known before the expiry of the one-year limitation period: *Edwards v Golding* (2007) Times, 22 May, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(i) Commencing Proceedings/168. The court.

## 3. PLEADING, PRACTICE AND RELIEF

### (1) PROCEEDINGS BEFORE TRIAL

#### (i) Commencing Proceedings

#### 168. The court.

Actions for libel and slander are normally heard by the Queen's Bench Division of the High Court<sup>1</sup>. However, such actions may be brought in the Chancery Division if other relief, of a type normally considered by that division, is also claimed<sup>2</sup>.

The county court does not have jurisdiction to hear libel or slander actions<sup>3</sup> except (1) with the agreement of the parties (in which case the action may be commenced there)<sup>4</sup>; or (2) where the action is remitted from the High Court<sup>5</sup>. A libel or slander claim may arise by way of counterclaim within an action otherwise within the county court's jurisdiction. These cases would appear to fall within the general ancillary jurisdiction of the County Court<sup>6</sup>.

Legal aid is not available for libel or slander actions<sup>7</sup>.

1 In defamation actions there is generally a right to jury trial, which is not available in the Chancery Division: see the Supreme Court Act 1981 s 69(1)(b); RSC Ord 33 r 5; the Supreme Court Practice 1997 para 33/5/3; CIVIL PROCEDURE; and JURIES vol 61 (2010) PARA 820. As to whether jury trial is appropriate in a case involving a public figure which requires prolonged examination of documents see *Aitken v Preston, Aitken v Granada Television Ltd* [1997] TLR 280, CA.

2 Eg for passing-off or infringement of copyright. If jury trial is sought, the action must be transferred to the Queen's Bench Division: see RSC Ord 33 r 5; the Supreme Court Practice 1997 para 33/5/3; and CIVIL PROCEDURE.

3 County Courts Act 1984 s 15(2)(c). See also *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, DC.

4 See the County Courts Act 1984 s 18 (amended by the Courts and Legal Services Act 1990 s 3); and COURTS vol 10 (Reissue) PARA 710.

5 See the County Courts Act 1984 s 40 (amended by the Courts and Legal Services Act 1990 s 2(1)); and COURTS vol 10 (Reissue) PARA 710.

6 See the County Courts Act 1984 s 38 (amended by the Courts and Legal Services Act 1990 s 3); and COURTS vol 10 (Reissue) PARA 711.

7 See PARA 2 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 168 The court

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(i) Commencing Proceedings/169. The writ.

#### 169. The writ.

The writ may be generally indorsed or specially indorsed with a statement of claim. If the former, it must be indorsed with a statement giving sufficient particulars of the publications<sup>1</sup> in respect of which the action is brought to enable them to be identified<sup>2</sup>. It follows from this that if the plaintiff wishes to rely in his statement of claim on publications not particularised in the indorsement on the writ, he must seek leave to amend the writ accordingly<sup>3</sup>.

There is no similar rule expressly requiring such particulars in a slander action; however, any writ must contain a concise statement of the nature of the claim made or the relief sought and it is at least desirable that the writ should give sufficient information to enable the recipient to identify the occasion when the tort was allegedly committed<sup>4</sup>.

It is normally prudent to issue a generally indorsed writ in a case of libel or slander since the writ, though not a separate statement of claim, may be inspected without the leave of the court on payment of a prescribed fee<sup>5</sup>. Reporting of the writ, including a repetition of the words complained of, may in consequence be protected by qualified privilege<sup>6</sup>.

A fees order which increased the fee for issuing the writ without making any exemption for litigants in person, and revoking previous powers to remit fees where there was undue financial hardship in exceptional circumstances, was held to be unlawful<sup>7</sup>.

1 The documents or the broadcasts complained of: see the Supreme Court Practice 1997 para 82/1-2/1.

2 RSC Ord 82 r 2.

3 If the plaintiff seeks judgment under RSC Ord 13 r 6 (see CIVIL PROCEDURE), he can only recover in respect of matters dealt with in the indorsement on the writ; therefore, if he desires to amend his statement of claim, he must also seek leave to amend his writ accordingly: *Law v Philby (No 2)* (1887) 56 LT 522; *Gee v Bell* (1887) 35 ChD 160; *Kingdon v Kirk* (1887) 37 ChD 141; *Jamaica Rly Co v Colonial Bank* [1905] 1 Ch 677, CA; *Southall Development Syndicate Ltd v Dunsdon* (1907) 96 LT 109.

4 *The 'Jangmi'* [1988] 2 Lloyd's Rep 462; on appeal [1989] 2 Lloyd's Rep 1, CA; *Sterman v EW & WJ Moore (a firm)* [1970] 1 QB 596, [1970] 1 All ER 581, CA.

5 RSC Ord 63 r 4(1)(a).

6 See the Defamation Act 1996 s 15(1), Sch 1 para 5; and PARA 132 ante. Cf, however, the limitation on the protection contained in s 15(3): see PARA 131 ante. At the date at which this volume states the law, s 15, Sch 1 had not been brought into force.

7 See *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, DC. The level of court fees is of particular significance in defamation actions since legal aid is not available: see PARA 2 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 169 The writ

NOTE 5--RSC Ord 63 r 4(1)(a) does not apply to an originating process by which an arbitration application is begun: RSC Ord 63 r 4(1A).

NOTE 6--1996 Act s 15, Sch 1 in force 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(ii) Interlocutory Injunctions/170. Court's powers.

## (ii) Interlocutory Injunctions

### 170. Court's powers.

The High Court may grant an interlocutory injunction<sup>1</sup> restraining the defendant, whether by himself or by his servants or agents or otherwise, from publishing or further publishing matter which is defamatory or a malicious falsehood<sup>2</sup>. It is not necessary to show that there has already been an actionable publication<sup>3</sup> or that damage has been sustained<sup>4</sup>. In appropriate cases an injunction may be granted ex parte and before the issue of a writ<sup>5</sup>.

1 See the Supreme Court Act 1981 s 37(1); and CIVIL PROCEDURE vol 11 (2009) PARA 347.

2 See eg *Bonnard v Perryman* [1891] 2 Ch 269, CA (libel); *Hermann Loog v Bean* (1884) 26 ChD 306, CA (slander); *Bestobell Paints Ltd v Bigg* (1975) 119 Sol Jo 678; *Kaye v Robertson* [1991] FSR 62, CA (malicious falsehood). As to applications for injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 303 et seq.

3 *Kitcat v Sharp* (1882) 52 LJ Ch 134.

4 See *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA.

5 As to ex parte applications see CIVIL PROCEDURE. See also *Fraser v Evans* [1969] QB 349, [1969] 1 All ER 8, CA, where the plaintiff undertook at the ex parte hearing to issue a writ within two days.

## UPDATE

### 168-273 Pleading, Practice and Relief



RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

## 170 Court's powers

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(ii) Interlocutory Injunctions/171. Exercise of jurisdiction.

### 171. Exercise of jurisdiction.

Because of the court's reluctance to fetter free speech before a trial<sup>1</sup> and because the questions that arise during the proceedings (such as what meaning or possible meanings the words bear, whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice) are generally for the jury<sup>2</sup>, interlocutory injunctions are granted less readily in defamation proceedings<sup>3</sup> and according to different principles<sup>4</sup>. An injunction will be granted only if the plaintiff can satisfy the court that any jury would say that the matter complained of was libellous and where, if it did not so find, the court would set aside its verdict as unreasonable<sup>5</sup>. It is for the plaintiff to show that the words are defamatory, false and, where relevant, published with actual malice<sup>6</sup>. In addition, he must prove that there is reason to believe that publication or further publication of the defamatory statement is threatened or intended<sup>7</sup>. Where no publication has yet taken place, a plaintiff may well be unable to prove with sufficient certainty what defamatory allegation the defendant is threatening to publish<sup>8</sup>. As with all interlocutory injunctions, the terms of any interlocutory injunction must be certain<sup>9</sup> and the court is likely to require an undertaking by the plaintiff as to damages<sup>10</sup>.

1 See *Bonnard v Perryman* [1891] 2 Ch 269 at 284, CA, per Lord Coleridge CJ; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; *Hubbard v Pitt* [1976] QB 142 at 174, [1975] 3 All ER 1 at 6, CA, per Lord Denning MR (street demonstrations are an aspect of free speech); *Bestobell Paints Ltd v Bigg* (1975) 119 Sol Jo 678; *Crest Homes Ltd v Ascott* [1980] FSR 396, CA; *Herbage v Pressdram Ltd* [1984] 2 All ER 769, [1984] 1 WLR 1160, CA.

2 *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846, CA, per Lord Esher MR, adopted in *Liverpool Household Stores Association v Smith* (1887) 37 ChD 170, CA; and *Bonnard v Perryman* [1891] 2 Ch 269, CA; cf *Fraser v Evans* [1969] 1 QB 349 at 360, [1969] 1 All ER 8 at 10, CA, per Lord Denning MR. The same principles apply to malicious falsehood actions in the Chancery Division, although jury trial is not available: *Bestobell Paints Ltd v Bigg* (1975) 119 Sol Jo 678; *Herbage v Pressdram Ltd* [1984] 2 All ER 769, [1984] 1 WLR 1160, CA.

3 *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 ChD 501, CA; *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846, CA ('a most delicate jurisdiction to exercise': per Lord Esher MR). See also note 4 infra.

4 For the general principles governing the grant of interlocutory injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 383 et seq. It now seems clear that defamation is outside the principles of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; see *Herbage v Pressdram Ltd* [1984] 2 All ER 769 at 771, [1984] 1 WLR 1160 at 1162, CA, per Griffiths LJ; and see *Hubbard v Pitt* [1976] QB 142 at 186, [1975] 3 All ER 1 at 16, CA, per Stamp LJ; *Bestobell Paints Ltd v Bigg* (1975) 119 Sol Jo 678; *Crest Homes Ltd v Ascott* [1980] FSR 396, CA. As to an alternative view see *J Trevor & Sons v Solomon* [1978] 2 EGLR 120, CA. See also *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA (a claim based on libel and breach of confidence); and *Fellowes & Son v Fisher* [1976] QB 122, [1975] 2 All ER 829, CA; *Office Overload Ltd v Gunn* [1977] FSR 39, CA, per Bridge LJ (analogous cases on restraint of trade).

5 le that the statement is defamatory and there is no reasonable defence: *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846, CA; *Liverpool Household Stores Association v Smith* (1887) 37 ChD 170, CA; *Bonnard v Perryman* [1891] 2 Ch 269, CA. Injunctions were granted in *Jarrahdale Timber Co Ltd and M'Lean Bros Ltd v Temperley & Co and Elliott & Sons* (1894) 11 TLR 119 (false claim to be 'sole importers' of certain wood); *London and Northern Bank Ltd v George Newnes Ltd* (1899) 16 TLR 76 (bank alleged to be in liquidation); *J Lyons & Co Ltd v Lipton Ltd* (1914) 49 L Jo 542; *Benidge v Billingshurst* (1914) 49 L Jo 542 (firm said to be owned by enemy aliens). See also *Monson v Tussauds Ltd*, *Monson v Louis Tussaud* [1894] 1 QB 671, CA.

6 *Armstrong v Armit* (1886) 2 TLR 887, DC; *Allinson v General Council of Medical Education and Registration* (1892) 8 TLR 784, CA.

7 *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 ChD 501, CA (defamatory circular already sent to all shareholders; injunction refused); *London Motor Cab Proprietors Association and British Motor Cab Co Ltd v Twentieth Century Press (1912) Ltd* (1917) 34 TLR 68.

8 See eg *British Data Management plc v Boxer Commercial Removals plc* [1996] 3 All ER 707, CA.

9 Distinguish final orders: see *Fenner v Wilson* [1893] 2 Ch 656.

10 See CIVIL PROCEDURE vol 11 (2009) PARAS 419-423.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(ii) Interlocutory Injunctions/172. No injunction if defence raised.

### 172. No injunction if defence raised.

It is well settled that no injunction will be granted if the defendant states his intention<sup>1</sup> of pleading a recognised defence, unless the plaintiff can satisfy the court that the defence will fail<sup>2</sup>. This principle applies not only to the defence of justification<sup>3</sup> but also to the defences of privilege<sup>4</sup>, fair comment<sup>5</sup>, consent<sup>6</sup>, meaning<sup>7</sup>, and probably any other defence<sup>8</sup>. When qualified privilege or fair comment is to be pleaded, an injunction may nevertheless be granted if the plaintiff can satisfy the court on the issue of malice<sup>9</sup>.

<sup>1</sup> le generally by swearing an affidavit that he will so plead, indicating the basis for the defence: see notes 2-7 infra.

<sup>2</sup> *Bonnard v Perryman* [1891] 2 Ch 269, CA; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; *Crest Homes Ltd v Ascott* [1990] FSR 396, CA ('where there were reasonable grounds for the defendant saying he was going to justify, the court would not grant an interlocutory injunction': per Lord Denning MR).

<sup>3</sup> *Bonnard v Perryman* [1891] 2 Ch 269, CA; *Collard v Marshall* [1892] 1 Ch 571; *Clement v Associated Newspapers* (1924) Times, 30 July, CA; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA. See also *Khashoggi v IPC Magazines Ltd* [1986] 3 All ER 577, [1986] 1 WLR 1412, CA, where the defendant successfully resisted an application for an injunction restraining publication of an allegation of sexual misconduct which the defendant did not seek to justify, because the allegation was inseparable from a 'common sting' of general promiscuity to which a proposed plea of justification might still succeed.

<sup>4</sup> *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 ChD 501, CA; *Armstrong v Armit* (1886) 2 TLR 887, DC; *Liverpool Household Stores Association v Smith* (1887) 37 ChD 170, CA; *Newton v Amalgamated*

*Musicians' Union* (1896) 12 TLR 623; *London Motor Cab Proprietors Association and British Motor Cab Co Ltd v Twentieth Century Press (1912) Ltd* (1917) 34 TLR 68; *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 2 All ER 769, [1982] 1 WLR 958, CA.

5 *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA.

6 *Monson v Tussauds Ltd, Monson v Louis Tussaud* [1894] 1 QB 671, CA.

7 *Herbage v Pressdram Ltd* [1984] 2 All ER 769, [1984] 1 WLR 1160, CA.

8 *Champion & Co Ltd v Birmingham Vinegar Brewery Co Ltd* (1893) 10 TLR 164, DC, obiter, per Lord Coleridge CJ: an injunction ought not to be granted if a jury might, on any ground reasonably suggested, find that a wrong was not done.

9 *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846, CA. The court will, however, be most reluctant to find malice at the interlocutory stage, since it is a matter for the jury: *Newton v Amalgamated Musicians' Union* (1896) 12 TLR 623.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 172 No injunction if defence raised

NOTE 2--The principle is unaffected by the enactment of the Human Rights Act 1998 s 12(3) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 104A.5): *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] 1 All ER 30, [2005] 3 WLR 281. The motive of the defendant in making the libel threat, the threatened manner or publication and the potential damage to the plaintiff are not normally grounds for making an exception to the general rule: *Holley v Smyth* [1998] 1 All ER 853, CA.

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#### 173. Delay and acquiescence.

No injunction will be granted if any of the general bars to equitable relief, such as delay or acquiescence, applies<sup>1</sup>. An injunction may be refused if the plaintiff does not come with clean hands<sup>2</sup>.

1 See *Poulett v Chatto and Windus* (1887) 4 TLR 35; on appeal 4 TLR 142, CA; CIVIL PROCEDURE vol 11 (2009) PARAS 373-375, 468; and EQUITY vol 16(2) (Reissue) PARA 901 et seq.

2 See eg *Hubbard v Vosper* [1972] 2 QB 84 at 101, [1972] 1 All ER 1023 at 1033, CA, per Megaw LJ. Although this case concerned copyright and confidential information, it is submitted that the principles apply to libel and slander.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### **174. Alternative causes of action.**

When a defamation claim is brought with claims based on other causes of action, such as breach of confidence, the principles relating to injunctions<sup>1</sup> will apply to the grant of an interlocutory injunction on the defamation claim. Where the issue on an alternative cause of action is essentially the same, it seems that those principles will also be applied<sup>2</sup>. Otherwise, the court will apply the principles which would have been applied had no defamation claim been made<sup>3</sup>. It is unclear in what circumstances the court will grant an injunction in cases of conspiracy to injure, to restrain two or more defendants from publishing statements which they assert are true<sup>4</sup>.

1    See those set out in PARAS 170-173 ante.

2    *Sim v HJ Heinz Co Ltd* [1959] 1 All ER 547, [1959] 1 WLR 313, CA (passing off).

3    *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611 (confidence); *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA; *Hubbard v Pitt* [1976] 1 QB 142, [1975] 3 All ER 1, CA.

4    Such an injunction was granted in *Gulf Oil (Great Britain) Ltd v Page* [1987] Ch 327, [1987] 3 All ER 14, CA. However, it is submitted that this jurisdiction should be sparingly exercised: see *Ward v Lewis* [1955] 1 All ER 55, [1955] 1 WLR 9, CA, not cited in *Gulf Oil (Great Britain) Ltd v Page* supra. As to the need to prove pecuniary loss in such cases see *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA.

#### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **174 Alternative causes of action**

NOTE 2--See *Service Corpn International plc v Channel Four Television Corpn* [1999] EMLR 83 (copyright claim brought to circumvent defence of public interest in defamation action, no injunction granted).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/A. STATEMENT OF CLAIM/175. General requirements.

#### **(iii) Pleadings**

## **A. STATEMENT OF CLAIM**

### **175. General requirements.**

A statement of claim in libel or slander must allege that the defendant published the words complained of, or caused them to be published<sup>1</sup>. It must also allege that he published them of and concerning the plaintiff, that is, that the words referred to the plaintiff<sup>2</sup>. Unless the plaintiff is named in the words complained of, it is necessary to plead the facts and matters which establish reference to him<sup>3</sup>. It is unnecessary to state that the words were published 'falsely and maliciously'<sup>4</sup>. The statement of claim should also indicate the circumstances in which the words were published<sup>5</sup> and, except in a case of general dissemination, such as by newspaper or broadcast, should identify, with as much precision as possible, the persons to whom it is alleged that publication was made<sup>6</sup>.

Where particulars of reference have been pleaded, the plaintiff may be required to identify those among the persons to whom publication was made who understood the words to refer to the plaintiff<sup>7</sup>. Where appropriate, it is permissible, but in a libel action not essential, to plead that the words were published of and concerning the plaintiff in the way of his trade, profession or calling, and in relation to his conduct in it, as being relevant to damages. In a slander action, it is essential to plead that the words were so published, or were calculated to disparage the plaintiff in the way of his trade, profession or calling, unless the slander is otherwise actionable per se or has caused actual material loss<sup>8</sup>.

1 As to the writ see PARA 169 ante.

2 *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 705, [1936] 1 All ER 287 at 289, CA, per Greer LJ. See also PARA 39 ante.

3 These are 'material facts' for the purposes of RSC Ord 18 r 7 (see PRACTICE AND PROCEDURE): see *Bruce v Odhams Press Ltd* [1936] 1 KB 697, [1936] 1 All ER 287, CA; *Knupffer v London Express Newspaper Ltd* [1944] AC 116, [1944] 1 All ER 495, HL. As to the meaning of 'reference to plaintiff' see *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL.

4 See PARA 16 ante.

5 Eg the date, place and medium of publication: see *Ebeling v Bucknell* (1911) 19 WWR 556 (date of publication); *Glegg v Bromley* (1909) (unreported; No 1909-G-1952) (place of slander); *Wingard v Cox* [1876] WN 106 (medium of publication).

6 *Roselle v Buchanan* (1886) 16 QBD 656, DC; *Bradbury v Cooper* (1883) 12 QBD 94, DC; *Williams v Ramsdale* (1887) 36 WR 125.

7 See *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, [1977] 1 WLR 651, CA; and PARA 181 post.

8 See PARAS 56-59 ante.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **175 General requirements**

NOTES--The need for extensive pleadings in defamation actions ought to be reduced by the requirement introduced by the Civil Procedure Rules 1998, SI 1998/3132, to exchange witness statements before trial: *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, CA.

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### **176. Pleading the words.**

In an action for defamation, the actual words complained of, and not merely their substance, must be set out verbatim in the statement of claim<sup>1</sup>. A libel action cannot be brought in respect of a document the contents of which the plaintiff is unaware<sup>2</sup>; but in a slander action interrogatories may, in an exceptional case, be permitted, prior to the statement of claim, to ascertain the precise words spoken<sup>3</sup>. It is no longer necessary to prove at trial the precise words pleaded; it will suffice to prove words substantially the same and the jury should be invited to consider whether the words are defamatory in the version it has accepted<sup>4</sup>. Where the plaintiff complains of a book or long article, he must specify the passages which he alleges to be defamatory rather than merely plead the whole book or article<sup>5</sup>.

If the words complained of were published in a language other than English, they should be set out in that language in the statement of claim with a translation into English in a separate paragraph<sup>6</sup>.

1 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 771, HL; citing *Bradlaugh v R* (1878) 3 QBD 607, CA; and *Harris v Warre* (1879) 4 CPD 125. See also *Wood v Brown* (1815) 6 Taunt 169; *Wright v Clements* (1820) 3 B & Ald 503; *Gutsole v Mathers* (1836) 1 M & W 495; *Solomon v Lawson* (1846) 8 QB 823, cited in notes to *Craft v Boite* (1669) 1 Wms Saund (1871 Edn) 310 at 311n (a).

2 *Collins v Jones* [1955] 1 QB 564, [1955] 2 All ER 145, CA; *Huddleston v Control Risks Information Services Ltd* [1987] 2 All ER 1035, [1987] 1 WLR 701.

3 *Atkinson v Fosbroke* (1866) LR 1 QB 628. As to interrogatories see PRACTICE AND PROCEDURE.

4 *Harris v Warre* (1879) 4 CPD 125; *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 469, CA, per Bankes LJ, at 478 per Scrutton LJ and at 487 per Atkin LJ.

5 *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* [1973] QB 21, [1972] 3 All ER 417, CA. The plaintiff may either plead extracts from the work (see eg *S and K Holdings Ltd v Throgmorton Publications Ltd* [1972] 3 All ER 497, [1972] 1 WLR 1036, CA) or set out the whole work, indicating the defamatory passages with insertions such as 'meaning thereby the plaintiff' (see *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* supra at 27 and at 419-420 per Lord Denning MR).

6 *Zenobio v Axtell* (1795) 6 Term Rep 162; *Jenkins v Phillips* (1841) 9 C & P 766. One should also plead, at any rate in a slander action, that the publishers understood the foreign language: *Amann v Damm* (1860) 8 CBNS 597. If the words are in eg Arabic script it may be necessary to append them to the statement of claim.

### **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **176 Pleading the words**

NOTE 1--The principles underlying the pleading of defamation claims are unaffected by the CPR: *Best v Charter Medical of England* [2001] EWCA Civ 1588, [2002] EMLR 335.

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### **177. Gestures and pictures.**

If that which is complained of is not, or not wholly, verbal, for example a cartoon or a gesture, it should be adequately described in the statement of claim<sup>1</sup>; in appropriate cases a photographic copy can be appended in place of a description, but in any event it will generally be necessary to plead facts and matters identifying the plaintiff as the subject of the representation<sup>2</sup>.

1 *Gutsole v Mathers* (1836) 1 M & W 495 at 501. See also *Monson v Tussauds Ltd*, *Monson v Louis Tussaud* [1894] 1 QB 671, CA (waxwork in chamber of horrors).

2 3 Bl Com (14th Edn) 125. For an example of libel by words and pictures see *Garbett v Hazell, Watson and Viney Ltd* [1943] 2 All ER 359, CA.

### **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### **178. Natural and ordinary meaning.**

In drafting a statement of claim in libel or slander, it is necessary to distinguish between cases in which the words complained of are alleged to be defamatory in their natural and ordinary meaning, whether the literal or the inferential meaning<sup>1</sup>, and those in which the defamatory meaning is a secondary meaning derived from extrinsic or special facts or matters, so that a legal or true innuendo must be pleaded<sup>2</sup>. If it is claimed that the words are defamatory in their natural and ordinary meaning, and the words bear only one literal meaning, which is clear and explicit, it is not necessary to plead the meaning in the statement of claim<sup>3</sup>. However, if the words are reasonably capable of bearing more than one literal meaning, or if the defamatory meaning relied on is inferential (a 'false' or 'popular' innuendo), the plaintiff should plead the defamatory meaning or meanings<sup>4</sup>. Where a defamatory meaning is pleaded otherwise than in the alternative, the plaintiff will not be permitted to set up an entirely different meaning at trial, unless the statement of claim can be amended accordingly<sup>5</sup>. However, the plaintiff may rely on a lesser injurious defamatory meaning than that pleaded provided that it is not entirely different<sup>6</sup>.

1 As to the meaning of 'natural and ordinary meaning', 'literal meaning' and 'inferential meaning' see PARAS 44-46 ante.

2 As to the innuendo see PARAS 47 ante, 179 post. See also *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340, [1962] 2 All ER 698, CA; affd [1964] AC 234, [1963] 2 All ER 151, HL, especially per Lord Devlin; *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, [1962] 2 All ER 380, CA; *Loughans v Odhams Press Ltd* [1963] 1 QB 299, [1962] 1 All ER 404, CA; explained and distinguished in *Lewis v Daily Telegraph Ltd* supra.

3 *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161, [1972] 2 All ER 26, CA.

4 *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340, [1962] 2 All ER 698, CA; affd [1964] AC 234, [1963] 2 All ER 151, HL; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 184, [1968] 1 All ER 497 at 512, CA, per Salmon LJ; *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161, [1972] 2 All ER 26, CA; *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* [1973] QB 21, [1972] 3 All ER 417, CA. This practice should now be treated as necessary rather than merely desirable: see, by analogy with a defendant's obligation to plead any meaning he seeks to justify, *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177, [1986] 1 WLR 147, CA.

5 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 184, [1968] 1 All ER 497 at 512, CA, per Salmon LJ, reversing the former practice.

6 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 175, [1968] 1 All ER 497 at 506, CA, per Diplock LJ, and at 185 and 512 per Salmon LJ.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### 179. Innuendo.

Whether or not the plaintiff has claimed that the words are defamatory in their natural and ordinary meaning<sup>1</sup>, he may wish to claim that they were understood to be defamatory in a secondary or extended meaning by those persons having knowledge of some special facts or matters<sup>2</sup>. This is a 'true' or 'legal' innuendo meaning<sup>3</sup> and constitutes a separate cause of action<sup>4</sup>. Such a meaning should be pleaded expressly in a separate paragraph in the statement of claim<sup>5</sup>, but care must be taken not to plead too wide a meaning thereby enabling the defendant to justify that wider meaning<sup>6</sup>. Particulars must be given of the facts and matters on which the plaintiff relies in support of any secondary or extended defamatory meaning which it is decided to plead<sup>7</sup>. These special facts or matters may be extrinsic to the words used, or there may be some special meaning of the words themselves.

1 See PARA 178 ante.

2 As to the innuendo see PARA 47 ante.

3 Both terms have been used. In *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 280, [1963] 2 All ER 151 at 170, HL, Lord Devlin expressed a preference for 'legal'.

4 *Watkin v Hall* (1868) LR 3 QB 396. It was recommended in the *Report of the Faulks Committee on the Law of Defamation* (Cmnd 5909) (1975) that the distinction be abolished and that a claim in defamation based on a



single publication with or without a plea of legal innuendo should constitute one cause of action with one award of damages.

5 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 280, [1963] 2 All ER 151 at 171, HL, per Lord Devlin.

6 *Maisel v Financial Times Ltd* (1915) 84 LJB 2145, HL.

7 RSC Ord 82 r 3(1). See also PARA 180 text and note 2 post.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### 180. Facts and matters supporting innuendo.

In any action for defamation the words complained of may themselves have a plain meaning, but persons with knowledge of certain extrinsic facts or matters relating to the subject matter of the words will understand them to bear a defamatory meaning different from the natural and ordinary meaning conveyed to an ordinary reader. Thus, to say of a man that he was seen to enter a named house would convey a defamatory implication only to one who knew that that house was a brothel<sup>1</sup>. The plaintiff should plead that the words bore the innuendo meaning that he visited a brothel, and plead the nature of the house as the fact relied upon to support the innuendo<sup>2</sup>. It is important to remember that other passages in the same article or publication in which the words complained of appear are not extrinsic facts to support an innuendo meaning; they form part of the context of the words complained of<sup>3</sup>. The extrinsic facts must exist and be known at the time of publication<sup>4</sup>.

The special knowledge may relate, not to the subject matter of the publication, but to the word or words used<sup>5</sup>. Thus, when the defamatory meaning arises from a slang usage<sup>6</sup>, a specialised or technical term<sup>7</sup>, a dialect<sup>8</sup> or foreign word<sup>9</sup> or irony<sup>10</sup> or a literary allusion or metaphorical phrase not in general currency<sup>11</sup>, it is necessary to plead the special meaning of the words and the fact that some of the persons to whom it is alleged that publication was made would have understood that usage<sup>12</sup>.

1 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 278, [1963] 2 All ER 151 at 169-170, HL, per Lord Devlin.

2 *Id* under RSC Ord 82 r 3(1).

3 *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, [1962] 2 All ER 380, CA.

4 *Grappelli v Derek Block (Holdings) Ltd* [1981] 2 All ER 272, [1981] 1 WLR 822, CA.

5 Since language changes rapidly, all authorities on particular usages (including those cited in notes 6-11 *infra*) should be viewed with extreme caution: see *Barnett v Allen* (1858) 3 H & N 376, where Pollock CB stated that the word 'blackleg' was generally used to mean a person who got his living by frequenting racecourses, whereas it is now usually used in relation to a strike-breaker.

6 See eg *Dakhyl v Labouchere* [1908] 2 KB 325n, HL ('quack'); *Blackman v Bryant* (1872) 27 LT 491 ('welsher'); *M'Gregor v Gregory* (1843) 11 M & W 287 ('black sheep').

7 Eg of a meat dealer, 'A sells No 2 hams' (meaning hams unfit to eat): *Herler v Pierce* 50 Pa Super 568 (1912).

8 *Tuck's Case* (1608) 1 Roll Abr 86 (Devon); *Pridham v Tucker* (1609) Yelv 153 (Yorkshire).

9 It is submitted that when the whole libel (as opposed to single words or phrases) is in a foreign language, one should not plead an innuendo as to meaning, but set out the words and a translation: see PARA 176 ante.

10 See PARA 182 post.

11 See eg *Australian Newspaper Co v Bennett* [1894] AC 284, PC ('Ananias'; cf Acts 5); *Forbes v King* (1833) 1 Dowl 672 ('Man Friday' meaning degrading subservience); *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 at 336, [1962] 2 All ER 380 at 396, CA, per Davies LJ ('Casanova' used as an example).

12 See PARA 179 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### 181. Persons having special knowledge.

The plaintiff who has pleaded a legal innuendo should in the particulars of the innuendo identify as best he can those readers or hearers who knew the special or extrinsic facts or matters on which he relies to support the innuendo<sup>1</sup>. This rule applies to cases of general dissemination, such as libel by newspaper or broadcast, as it does to more limited publications. However, in cases of general dissemination it will usually suffice to plead matters from which it can be inferred that there would be readers with knowledge of the special or extrinsic facts, but if the circumstances are such that it would be extraordinary for a reader to know those facts and hence to understand the words to bear the secondary or extended meaning, full particulars of the precise persons or classes of person alleged to have such knowledge should be given<sup>2</sup>.

1 *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, [1977] 1 WLR 651, CA. As to special facts see PARA 180 ante.

2 *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32 at 39, [1977] 1 WLR 651 at 659, CA, per Scarman LJ.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/A. STATEMENT OF CLAIM/182. Innuendo depending on surrounding circumstances.

### **182. Innuendo depending on surrounding circumstances.**

Where an imputation is made in an oblique way<sup>1</sup>, or by way of question<sup>2</sup>, conjecture<sup>3</sup>, epithet, report or exclamation<sup>4</sup>, or where the imputation is made by antithesis<sup>5</sup>, or in any other than a direct and explicit manner<sup>6</sup>, the defamatory meaning will usually be the inferential meaning<sup>7</sup> and not a true or legal innuendo. This will also be the case in relation to irony, where the irony is apparent on the face of the words. However, in cases of slander or libel by broadcast in which the ironical usage is demonstrated by vocal tone or by gestures, the tone or gestures may be said to be part of the defamatory publication and not facts extrinsic to it, and the plaintiff should plead the gestures or other manner of publication relied on<sup>8</sup>. The fact that the words are true in their literal meaning is no defence to an action based upon them in their ironic meaning<sup>9</sup>.

In some cases a plaintiff may be uncertain whether the facts or the usage he is considering are matters of special or of common knowledge; he must then ask himself whether he contemplates that evidence will be called in support of his allegation. If it will be called, it is a legal innuendo. If he is still in doubt, he can plead both a legal and a popular innuendo in the alternative, and at the trial the judge may rule that it is a matter of common knowledge, in which case the legal innuendo may be dropped<sup>10</sup>.

1 Com Dig, Action on Case for Defamation (E 1); see also *Moore v Lawson* (1915) 31 TLR 418, CA; *Gordon v John Leng & Co* 1919 SC 415.

2 Com Dig, Action on Case for Defamation (E 2).

3 Com Dig, Action on Case for Defamation (E 3); cf (F 13). As to words conveying a mere suspicion of crime see PARA 56 ante.

4 Com Dig, Action on Case for Defamation (E 4)-(E 6).

5 Com Dig, Action on Case for Defamation (E 7)-(E 8).

6 Eg a heading such as 'Shameful Conduct of an Attorney': *Lewis v Clement* (1820) 3 B & Ald 702; affd (1822) 3 Brod & Bing 297, Ex Ch; cf *Bishop v Latimer* (1861) 4 LT 775.

7 Ie the natural and ordinary meaning: see PARA 46 ante.

8 Cf paras 179-180 ante.

9 *Chapman v Lord Ellesmere* [1932] 2 KB 431, CA.

10 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 281, [1963] 2 All ER 151 at 173, HL, per Lord Devlin.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/A. STATEMENT OF CLAIM/183. Pleading damages in actions of libel or slander actionable per se.

### **183. Pleading damages in actions of libel or slander actionable per se.**

A plaintiff must give full particulars in the statement of claim in any action for libel or slander of the facts and matters he relies upon to support his claim for damages, including details of any conduct by the defendant which it is alleged has increased the loss suffered and of any loss which is peculiar to the plaintiff's own circumstances<sup>1</sup>. Accordingly a claim for aggravated damages must be fully pleaded and particularised. In actions of libel and in actions of slander for words which are actionable per se<sup>2</sup> it is not necessary for the plaintiff to allege in his statement of claim that he has suffered actual material loss or damage<sup>3</sup>. However, if in such actions he wishes to recover actual material loss, he must allege and prove it<sup>4</sup>. If he fails to prove such damage, he still has the right to recover general damages<sup>5</sup>. A loss of general custom flowing directly and in the ordinary course of things from a libel may be alleged and proved generally, but it must be clearly pleaded<sup>6</sup>. Such damage is not special damage strictly so called, but a head of general damage<sup>7</sup>.

In an action of slander for words actionable per se, the law as to alleging and proving the loss of general custom is the same in theory as in the case of a libel action. If the loss of general custom flows directly and in the ordinary course of things from the defendant's original utterance or from a repetition for which he is responsible, it is sufficient to allege and prove such loss generally<sup>8</sup>.

1 RSC Ord 82 r 3(3A).

2 As to slander actionable per se see PARAS 56-59 ante.

3 See *Lowe v Harewood* (1628) W Jo 196; *Malachy v Soper* (1836) 3 Bing NC 371 at 382 per Tindal CJ. As to special damage see PARAS 257-259 post.

4 See *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA.

5 *Smith v Thomas* (1835) 2 Bing NC 372 at 380 per Tindal CJ.

6 See note 1 supra; and *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA. See also *Ratcliffe v Evans* [1892] 2 QB 524 at 529, CA.

7 *Ratcliffe v Evans* [1892] 2 QB 524, CA, approving the statement of Pollock CB in *Harrison v Pearce* (1859) 32 LTOS 298. As to pleading financial loss generally see *Perestrello e Companhia Ltda v United Paint Co Ltd* [1969] 3 All ER 479, [1969] 1 WLR 570, CA.

8 *Ratcliffe v Evans* [1892] 2 QB 524 at 530, CA. As to repetition of slander see PARAS 80-81 ante. See also *Evans v Harries* (1856) 1 H & N 251, cited in *Ratcliffe v Evans* supra, where the court held that general evidence of the decline of business was receivable. Cf *M'Loughlin v Welsh* (1846) 10 ILR 19 (cited in *Ratcliffe v Evans* supra) as another instance. If in such a case the statement of claim alleges the loss of special customers in addition to a general allegation of loss of business, the jury may assess damages for a general loss or decrease of trade (if proved), even though the loss of particular customers is not proved: *Evans v Harries* supra. The principle also applies to libel actions.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/A. STATEMENT OF CLAIM/184. Pleading damage in actions of slander not actionable per se.

#### **184. Pleading damage in actions of slander not actionable per se.**

In actions of slander for words not actionable per se, actual damage must be alleged in the statement of claim and proved<sup>1</sup>. As much certainty and particularity will be insisted on, both in pleading and proof of damage<sup>2</sup>, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done<sup>3</sup>.

For instance, the loss of particular customers obviously admits of greater particularity than the diminution in the total business. If it is impossible, having regard to the nature of the particular case, to allege and prove the loss of particular customers, it is sufficient to allege and prove loss of custom, so long as the loss of custom is alleged with as great certainty and precision as the nature of the particular case allows<sup>4</sup>.

1 *Ratcliffe v Evans* [1892] 2 QB 524 at 532, CA, referring to *Malachy v Soper* (1836) 3 Bing NC 371; *Lowe v Harewood* (1628) W Jo 196; *Cane v Golding* (1649) Sty 176; *Tasburgh v Day* (1618) Cro Jac 484; *Evans v Harlow* (1844) 5 QB 624.

2 As to damages see PARAS 248-270 post.

3 *Ratcliffe v Evans* [1892] 2 QB 524 at 532, CA, referring to *J'Anson v Stuart* (1787) 1 Term Rep 748 at 754; *Lord Arlington v Merricke* (1672) 2 Saund 411; *Grey v Friar* (1850) 15 QB 901, Ex Ch; *Westwood v Cowne* (1816) 1 Stark 172 per Lord Ellenborough; *Iveson v Moore* (1699) 1 Ld Raym 486; *Hargrave v Le Breton* (1769) 4 Burr 2422, and criticising *Riding v Smith* (1876) 1 Ex D 91.

4 *Ratcliffe v Evans* [1892] 2 QB 524, CA; *Hartley v Herring* (1799) 8 Term Rep 130 (an allegation of unchastity against a dissenting minister led to a claim for loss of income from his congregation; it was held unnecessary to give names of congregation); cf *Evans v Harries* (1856) 1 H & N 251 (innkeeper suing for slander actionable per se).

### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### **185. Loss of particular customers.**

In all actions of defamation the loss of particular customers must be pleaded specifically. Evidence of such a loss is inadmissible unless it is so pleaded<sup>1</sup>.

<sup>1</sup> *Bluck v Lovering* (1885) 1 TLR 497, DC, approved in *Ratcliffe v Evans* [1892] 2 QB 524, CA; *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA; cf *Ingram v Lawson* (1838) 9 C & P 326 (action on the case for libel on a ship).

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### 186. Aggravated damages.

Where the injury to the plaintiff has been aggravated by the conduct of the defendant, the plaintiff may claim aggravated damages. Such damages are part of, or included in, the sum awarded as general damage and are, therefore, at large<sup>1</sup>. Although they need not be included in the prayer for relief<sup>2</sup>, the details of the defendant's conduct must be pleaded in the statement of claim<sup>3</sup>.

<sup>1</sup> *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86 at 104, [1964] 3 All ER 947 at 957, CA, per Pearson LJ; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. As to aggravated damages see PARAS 248, 250 et seq post.

<sup>2</sup> As to the prayer for relief see PARA 188 post.

<sup>3</sup> RSC Ord 82 r 3(3A). See PARA 183 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### 187. Exemplary damages.

A claim for exemplary damages<sup>1</sup> must be specifically pleaded, together with the facts on which the party pleading relies<sup>2</sup>.

<sup>1</sup> As to exemplary damages see PARA 256 post.

<sup>2</sup> RSC Ord 18 r 8(3); negating the contrary ruling in *Broome v Cassell & Co Ltd* [1971] 2 QB 354, [1971] 2 All ER 187, CA; see also on appeal [1972] AC 1027 at 1083, [1972] 1 All ER 801 at 834, HL, per Lord Hailsham of St Marylebone LC.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### **188. The prayer for relief.**

It is not the practice to specify the amount claimed by way of general damages; nor is it prudent to do so since, for example, conduct by the defendant subsequent to the writ may aggravate the damages<sup>1</sup>. An injunction may be sought, even if none was claimed in the writ<sup>2</sup>; and if so, circumstances indicating a likelihood that the words will be repeated should be pleaded.

<sup>1</sup> As to the complications which may result see eg *Chattell v Daily Mail Publishing Co Ltd* (1901) 18 TLR 165, CA.

<sup>2</sup> See RSC Ord 18 r 15(2) which states that the statement of claim may be amended without amending the indorsement on the writ. As to injunctions see PARA 170 et seq ante, 271-273 post.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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## **B. DEFENCE**

#### **189. Justification.**

Before pleading justification, a defendant should believe that the words complained of were true, intend to support the defence at trial and have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegations would be available at trial<sup>1</sup> for example as provided by discovery materials. It is no longer necessary that there should be 'clear and sufficient evidence' to support it<sup>2</sup>, as was assumed in the old test. A

defendant is now obliged to plead clearly and without obfuscation the meaning or meanings which he seeks to justify<sup>3</sup>. It is desirable, and now the practice, to set out these meanings at the start of the defence of justification in order that they do not become confused with the particulars of justification<sup>4</sup>. However, if particulars of the justification are required to prevent the plaintiff being taken by surprise, they must be given. If a defendant wishes to rely on the statutory defence of justification<sup>5</sup> it must be specifically pleaded<sup>6</sup>.

1 *McDonald's Corpn v Steel* [1995] 3 All ER 615 at 621, CA, per Neill LJ.

2 *McDonald's Corpn v Steel* [1995] 3 All ER 615, CA, disapproving the dictum of Lord Denning MR to this effect in *Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450 at 456, [1970] 2 All ER 754 at 757-758, CA, which had been cited and approved in *Atkinson v Fitzwalter* [1987] 1 All ER 483 at 485, [1987] 1 WLR 201 at 204, CA; and in *Prager v Times Newspapers Ltd* [1988] 1 All ER 300 at 309, [1988] 1 WLR 77 at 89.

3 *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177, [1986] 1 WLR 147, CA; *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733, CA. Such meanings are to be distinguished from the defendant's case as to what meaning or meanings he contends the words complained of bear, which a defendant is not obliged to plead: *Viscount de L'Isle v Times Newspapers Ltd* [1987] 3 All ER 499 at 507, [1988] 1 WLR 49 at 60, CA, per Mustill LJ; *Prager v Times Newspapers Ltd* [1988] 1 All ER 300, [1988] 1 WLR 77. As to what words and meanings a defendant may justify see PARAS 83-84 ante.

4 *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733 at 738, CA, per May LJ. As to the particulars of justification see PARA 190 post.

5 I.e. the Defamation Act 1952 s 5: see PARA 86 ante.

6 See PARA 86 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 189 Justification

NOTES--The principles of defamation law and practice relating to a plea of justification based on reasonable grounds for suspicion that the claimant committed an offence are not affected by the Human Rights Act 1998: *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 218.

NOTE 1--Where a libel asserts fraud, a pleading that seeks to justify it is indistinguishable from a direct allegation of fraud, and what amounts to 'reasonable evidence' or 'reasonable grounds' must be measured accordingly: *B v J* [1999] EMLR 490, applying *McDonalds Corpn v Steel*, cited.

NOTE 3--A defendant, for the purposes of setting out the meanings of the words he seeks to justify, can make reference to words in the relevant publication which are not the subject of the proceedings: *Carlton Communications plc v News Group Newspapers Ltd* [2001] EWCA Civ 1646, [2002] EMLR 299.



## 190. Particulars of justification.

The facts relied on to support a plea of justification must be properly particularised<sup>1</sup>, since the plaintiff ought to be able to go to trial with knowledge of the acts which it will be alleged he has committed<sup>2</sup>.

Accordingly, a defendant who pleads justification to a general charge must give full particulars of the facts he relies on as showing that the defamatory statement is true<sup>3</sup>. The particulars must be relevant and must be capable of justifying the meaning or meanings the defendant seeks to justify. If they are irrelevant, vague or embarrassing, they will be struck out<sup>4</sup>. Particulars may also be struck out if they are so prolix that they are likely to delay the fair trial of the action<sup>5</sup>. A defence which leaves in doubt what the defendant justifies and what he does not will be struck out as embarrassing<sup>6</sup>. However, the court will not strike out particulars which might suffice to justify a defamatory meaning which the words are capable of bearing, provided that is a meaning which the defendant seeks to justify<sup>7</sup> and the particulars are not prolix or otherwise oppressive.

Where the defamatory statement not only charges the plaintiff with a specific wrongful act but also contains a general allegation, the defendant is entitled to give, by way of justification of general character and tendency, particulars of other wrongful acts of the same kind not connected with the specific charge<sup>8</sup>, even if such acts occurred after the date of publication, provided they tend to prove the charge at the date of publication<sup>9</sup>. Where the libel is divisible, the defendant is entitled to plead justification as to part only of the defamatory statement<sup>10</sup>.

The defendant may not refuse to give particulars merely on the ground that to do so would disclose the names of his witnesses<sup>11</sup>.

1 *McDonald's Corp'n v Steel* [1995] 3 All ER 615 at 621, CA, per Neill LJ. See also *Atkinson v Fitzwalter* [1987] 1 All ER 483, [1987] 1 WLR 201, CA (amendment to plead justification).

2 *Wootton v Sievier* [1913] 3 KB 499, CA; *Zierenberg v Labouchere* [1893] 2 QB 183, CA; *J'Anson v Stuart* (1787) 1 Term Rep 748 at 752; *Hickinbotham v Leach* (1842) 10 M & W 361 at 363 (the defence should state the charge with the same precision as an indictment); *Newman v Bailey* (1776) 2 Chit 665; *Holmes v Catesby* (1809) 1 Taunt 543; *Jones v Stevens* (1822) 11 Price 235; *Gourley v Plimsoll* (1873) LR 8 CP 362; *Jones v Bewicke* (1869) LR 5 CP 32; *Odger v Mortimer* (1873) 28 LT 472. A plaintiff cannot be expected to come to trial prepared to justify his whole life: *J'Anson v Stuart* (1787) 1 Term Rep 748 at 752. See also PARA 189 text and note 4 ante. As to particulars see *Hennessy v Wright* (1888) 57 LJQB 594, CA; *Markham v Wernher, Beit & Co* (1902) 18 TLR 763, HL; *Devereux v Clarke & Co* [1891] 2 QB 582, DC, where the defendants were ordered to specify the passages on which they intended to rely. As to the conclusiveness of a conviction see the Civil Evidence Act 1968 s 13 (as amended); para 236 post; and CIVIL PROCEDURE vol 12 (2009) PARA 1209. As to pleading a spent conviction see PARA 92 ante.

3 *Arnold and Butler v Bottomley* [1908] 2 KB 151, CA. As to the use of previous convictions as particulars of justification of a general charge see *London Computer Operators Training Ltd v British Broadcasting Corp'n* [1973] 2 All ER 170, [1973] 1 WLR 424, CA.

4 *Markham v Wernher, Beit & Co* (1902) 18 TLR 763, HL.

5 *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733, CA; *Atkinson v Fitzwalter* [1987] 1 All ER 483, [1987] 1 WLR 201, CA. Nor should a defendant act oppressively in particularising his plea of justification: *Polly Peck Holdings plc v Trelford* [1986] QB 1000, [1986] 2 All ER 84, CA. A defence of justification will not be struck out at the interlocutory stage merely because the defendant does not then have admissible evidence to prove it, if it remains capable of being proved: *McDonald's Corp'n v Steel* [1995] 3 All ER 615, CA. See also PARA 189 notes 1-2 ante.

6 *Fleming v Dollar* (1889) 23 QBD 388, DC.

7 *Williams v Reason* [1988] 1 All ER 262, [1988] 1 WLR 96n, CA; *Polly Peck Holdings plc v Trelford* [1986] QB 1000, [1986] 2 All ER 84, CA; *Godman v Times Publishing Co Ltd* [1926] 2 KB 273, CA; *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413, [1959] 1 All ER 453, CA; and see *Waters v Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758, [1961] 1 WLR 967, CA; *London Computer Operators Training Ltd v British Broadcasting*

*Corpn* [1973] 2 All ER 170, [1973] 1 WLR 424, CA. As to what words and meanings may be justified see PARA 83 et seq ante.

8 *Maisel v Financial Times Ltd* (1915) 84 LJKB 2145, HL; *MacGrath v Black* (1926) 95 LJKB 951, CA.

9 *Maisel v Financial Times Ltd* [1915] 3 KB 336, CA; *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282, [1988] 1 WLR 116n, CA.

10 *Fleming v Dollar* (1889) 23 QBD 338 at 392, DC, per Lord Coleridge CJ, citing *Mountney v Watton* (1831) 2 B & Ad 673; *M'Gregor v Gregory* (1843) 11 M & W 287. See also *Smith v Parker* (1844) 13 M & W 459. See also PARA 87 ante.

11 *Wootton v Sievier* [1913] 3 KB 499, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/B. DEFENCE/191. Fair comment.

#### 191. Fair comment.

A defendant is now obliged to plead clearly the defamatory comments which he contends are protected by the defence of fair comment<sup>1</sup>. It is desirable, and now the practice, to set out those comments at the start of the defence of fair comment<sup>2</sup>. The defendant must also plead and properly particularise the facts on which the comment is based<sup>3</sup>. If the defendant is commenting on statements made on a privileged occasion, both the statements and the ground for the privilege should be sufficiently identified in the supporting particulars<sup>4</sup>.

A defendant who pleads fair comment may rely on particulars containing statements defamatory of the plaintiff although there is no plea of justification<sup>5</sup>. Where, however, the words complained of include both defamatory statements of fact and defamatory expressions of opinion, a plea of fair comment will not provide a defence to the defamatory statements of fact<sup>6</sup>.

Reliance on the statutory defence of fair comment<sup>7</sup> must be pleaded<sup>8</sup>.

1 *Control Risks Ltd v New English Library Ltd* [1989] 3 All ER 577, [1990] 1 WLR 183, CA, applying the principles in *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177, [1986] 1 WLR 147, CA. As to the defence of fair comment see PARAS 135-148 ante.

2 Applying by analogy *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733 at 738, CA, a case on justification.

3 *Cunningham-Howie v FW Dimpleby & Sons Ltd* [1951] 1 KB 360, [1950] 2 All ER 882, CA. As to what facts may be relied on see PARAS 140-141 ante.

4 As to commenting on privileged material see PARA 142 ante.

5 *Burton v Board* [1929] 1 KB 301, CA; *Kemsley v Foot* [1952] AC 345, [1952] 1 All ER 501, HL.

6 *Broadway Approvals Ltd v Odhams Press Ltd* [1964] 2 QB 683, [1964] 2 All ER 904n. See also PARA 148 ante.

7 le under the Defamation Act 1952 s 6: see PARA 140 ante.

8 See PARA 140 note 4 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 191 Fair comment

NOTES--Whether comment can be shown to be fair depends on whether a defendant expresses his opinions honestly and upon facts accurately stated: *Branson v Bowyer* [2001] All ER (D) 159 (Jun).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/B. DEFENCE/192. The rolled-up plea.

#### 192. The rolled-up plea.

The defendant may plead that, in so far as the words complained of consist of statements of fact they are true in substance and in fact, and in so far as they are expressions of opinion they are fair comment<sup>1</sup>. This is known as 'the rolled-up plea', and is a plea of fair comment, not justification<sup>2</sup>. Particulars must be given stating which of the words complained of are alleged to be statements of fact, and of the facts or matters relied on in support of the allegation that the words are true<sup>3</sup>. In consequence of this requirement, the plea is no longer in general use<sup>4</sup>.

1 See *Penrhyn v Licensed Victuallers' Mirror* (1890) 7 TLR 1, DC.

2 *Sutherland v Stopes* [1925] AC 47, HL; *Digby v Financial News Ltd* [1907] 1 KB 502, CA; *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239, CA; *Lyons v Financial News Ltd* (1909) 53 Sol Jo 671, CA. See also PARA 82 note 4 ante.

3 RSC Ord 82 r 3(2).

4 See *Lord v Sunday Telegraph Ltd* [1971] 1 QB 235, [1970] 3 All ER 504, CA, per Lord Denning MR.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/B. DEFENCE/193. Particulars of privileged occasion.

### **193. Particulars of privileged occasion.**

In an action of libel or slander where the defendant pleads that the defamatory statement was published on a privileged occasion<sup>1</sup>, he must give particulars of the facts and matters relied on to support his plea of privilege<sup>2</sup>.

1 As to absolute and qualified privilege see PARA 94 et seq ante.

2 *Elkington v London Association for the Protection of Trade* (1911) 27 TLR 329, CA; *Simmonds v Dunne* (1871) IR 5 CL 358 at 362.

#### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/B. DEFENCE/194. Mitigation.

### **194. Mitigation.**

A defendant must specifically plead any facts relied on to mitigate or otherwise in relation to damages<sup>1</sup>.

1 RSC Ord 18 r 12(1)(c). As to mitigation of damages see PARA 260 et seq post.

#### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/C. REPLY/195. Pleading malice.

### **C. REPLY**

### **195. Pleading malice.**

If the defendant pleads that any of the words or matters complained of are fair comment on a matter of public interest<sup>1</sup>, or were published on an occasion of qualified privilege<sup>2</sup>, the plaintiff must, if he intends to rebut those defences by showing that the defendant was actuated by

express malice<sup>3</sup>, serve a reply giving particulars of the facts and matters from which such malice is to be inferred<sup>4</sup>.

This rule applies in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made were the defendant<sup>5</sup>.

1 As to the defence of fair comment see PARA 135 et seq ante.

2 As to the defence of qualified privilege see PARA 109 et seq ante.

3 As to the effect of express malice see PARA 149 et seq ante. As to the distinction between express malice and malice in law see PARA 16 ante.

4 RSC Ord 82 r 3(3).

5 RSC Ord 82 r 3(4).

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/C. REPLY/196. Pleading to particulars of justification and fair comment.

#### **196. Pleading to particulars of justification and fair comment.**

Where a defendant pleads justification or fair comment, the plaintiff must specifically admit or deny any allegation raised by the defendant and specify any fact or matter which he relies on in opposition to the defendant's allegations<sup>1</sup>.

1 RSC Ord 82 r 3(2A). Strictly read, the rule only applies to the defence identified in Ord 82 r 3(2), ie the rolled-up plea: see PARA 192 ante. However, since that defence is no longer in general use, it is submitted that the rule, as is the current practice, should be approached on the wider basis set out in the text: see the Supreme Court Practice 1997 para 82/3/2. It is further submitted that the court will not require a plaintiff specifically to admit or deny facts alleged by the defendant which are not then within the plaintiff's knowledge and whose truth or falsity he cannot then verify by reasonable inquiry.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(1) PROCEEDINGS BEFORE TRIAL/(iii) Pleadings/D. AMENDMENT/197. Power and need for amendment.

## **D. AMENDMENT**

### **197. Power and need for amendment.**

At any stage of the proceedings, the court or a judge may allow either party to alter or amend his indorsement or pleadings in such manner and on such terms<sup>1</sup> as may be just, and all such amendments as may be necessary to determine the real questions in controversy between the parties will normally be allowed, provided the other party can be adequately compensated in money and that it can be done without serious injustice to the other party<sup>2</sup>. The fact that the proposed amendment would increase the costs of the action is not of itself a reason to disallow the amendment<sup>3</sup>. However, leave to amend a pleading will not be given unless the new plea is in an adequate form<sup>4</sup>. If the words proved at trial differ from those pleaded, the divergence may be cured by amendment at the court's discretion<sup>5</sup>.

If in an action for libel the plaintiff wishes to rely in his statement of claim on publications not particularised in the indorsement on the writ, he should apply for leave to amend the writ<sup>6</sup>.

1 As to terms see *Zenobio v Axtell* (1795) 6 Term Rep 162; *Jacobs v Schmaltz* (1890) 62 LT 121.

2 See RSC Ord 20 rr 5, 8(1) (amendments with leave); *Cropper v Smith* (1884) 26 ChD 700 at 710-711 per Bowen LJ; *Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450, [1970] 2 All ER 754, CA (amendment to plead justification allowed); *Atkinson v Fitzwalter* [1987] 1 All ER 483, [1987] 1 WLR 201, CA (amendment to plead justification refused).

3 *Mackenzie v Business Magazines (UK) Ltd* [1996] TLR 127, CA.

4 See *Ward v Lewis* [1955] 1 All ER 55 at 57, [1955] 1 WLR 9, CA (no nexus between alleged slander and special damage).

5 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 487, CA, per Atkin LJ.

6 The writ must bear sufficient particulars of the publications in respect of which the action is brought to enable them to be identified: RSC Ord 82 r 2. See PARA 169 ante.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **197 Power and need for amendment**

NOTE 2--See also *Tancic v Times Newspapers Ltd* (2000) Times, 12 January, CA (amendment to plead further justification, peripheral to defence, refused).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/198. Interlocutory practice.

## **(2) INTERLOCUTORY MATTERS**

### **198. Interlocutory practice.**

In general, interlocutory practice and procedure in libel and slander actions are similar to those in other Queen's Bench matters<sup>1</sup>. The respects in which defamation practice and procedure materially differ are set out below<sup>2</sup>.

1 See generally PRACTICE AND PROCEDURE.

2 See PARAS 199-206 post.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/199. Joinder and consolidation.

### **199. Joinder and consolidation.**

In defamation, as in other actions, the plaintiff may join several causes of action in one action<sup>1</sup>. The court has jurisdiction to sever, but if the evidence on one claim is relevant and admissible in the other, even if only on damages, severance will not normally be ordered<sup>2</sup>.

On an application by or on behalf of two or more defendants in actions in respect of the same, or substantially the same, libel or slander, or slander of title or goods or other malicious falsehood, brought by one and the same person, the court or a judge may make an order for the consolidation of the actions, so that they may be tried together<sup>3</sup>. After such an order has been made, and before the trial of the actions, the defendants in any new actions instituted in respect of the same, or substantially the same, libel or slander, or slander of title or goods or other malicious falsehood, are also entitled to be joined in a common action, on a joint application being made by the new defendants and the defendants in the actions already consolidated<sup>4</sup>.

In a consolidated action under this provision the jury must assess the whole amount of the damages, if any, in one sum, but a separate verdict must be taken for or against each defendant as if the actions consolidated had been tried separately, and, if the jury has found a verdict against the defendant or defendants in more than one of the actions so consolidated, it must proceed to apportion<sup>5</sup> the amount of damages which it has so found between and against the last-mentioned defendants, and the judge at the trial, if he awards to the plaintiff the costs of the action, must then make such order as he deems just for the apportionment of the costs between and against the defendants<sup>6</sup>.

Consolidated actions may be deconsolidated<sup>7</sup>. If consolidation is inappropriate, an order may be made directing that the actions be tried consecutively by the same judge and, if appropriate, the same jury<sup>8</sup>.

1 See RSC Ord 15 r 1(1); and PRACTICE AND PROCEDURE.

2 *Bridgmont v Associated Newspapers Ltd* [1951] 2 KB 578, [1951] 2 All ER 285, CA, applying *Pearson v Lemaitre* (1843) 5 Man & G 700; and see PARA 251 post.

3 See the Law of Libel Amendment Act 1888 s 5; and the Defamation Act 1952 s 13. Under RSC Ord 4 r 9 there is jurisdiction to consolidate (a) separate actions brought by two or more plaintiffs against the same

defendant in respect of the same libel and (b) separate actions brought against different defendants in respect of substantially the same words: *Horwood v Statesman Publishing Co Ltd* (1929) 98 LJKB 450, CA; cf *Marchant v Ford* [1936] 3 All ER 104, CA (consolidation embarrassing). As to the desirability of separate actions when aggravated or exemplary damages are claimed see PARA 249 post. As to consolidation generally see PRACTICE AND PROCEDURE.

4 See the Law of Libel Amendment Act 1888 s 5; and the Defamation Act 1952 s 13.

5 The apportionment must be made by the judge if he is sitting alone: *Mitchell v Hirst, Kidd and Rennie Ltd* [1936] 3 All ER 872.

6 Law of Libel Amendment Act 1888 s 5.

7 *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601, [1964] 1 All ER 705, CA.

8 *Daws v Daily Sketch and Sunday Graphic Ltd* [1960] 1 All ER 397, [1960] 1 WLR 126, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/200. Mode of trial.

#### 200. Mode of trial.

Any party to an action for libel or slander is entitled to have the action tried with a jury, unless the trial of the action requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury<sup>1</sup>. The method of, and time for, application for trial with a jury is dealt with elsewhere in this work<sup>2</sup>.

1 See the Supreme Court Act 1981 s 69(1); and PARA 168 ante; and see *Shordiche-Churchward v Cordle* [1959] 1 All ER 599, [1959] 1 WLR 351, CA; *Richards v Naum* [1967] 1 QB 620, [1966] 3 All ER 812, CA (trial by judge alone ordered); *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448, CA (jury trial ordered although prolonged inspection of documents would be required); *Beta Construction Ltd v Channel Four Television Co Ltd* [1990] 2 All ER 1012, [1990] 1 WLR 1042, CA; *Aitken v Preston, Aitken v Granada Television Ltd* [1997] TLR 280, CA (action concerning plaintiff's fitness for public office; where prolonged examination of documents required, court should concentrate on what best served the interests of justice rather than on any public perception giving preference to trial by jury in such a case). See also JURIES vol 61 (2010) PARA 820.

2 As to determination of the mode of trial see RSC Ord 33 r 4; and as to applications for trial by jury see Ord 33 r 5. See further CIVIL PROCEDURE; JURIES vol 61 (2010) PARA 820.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 200 Mode of trial



NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/201. Payment into court.

## **201. Payment into court.**

The defendant or, if more than one defendant, any or all of them, may pay into court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where two or more causes of action are joined<sup>1</sup> in the action, a sum or sums of money in satisfaction of any or all of those causes of action<sup>2</sup>. On making or increasing any such payment in, the defendant or defendants must give notice to the plaintiff and the other defendants, if any<sup>3</sup>. It is not necessary to state in the notice whether liability is admitted or denied<sup>4</sup>. Leave is required to withdraw or amend the notice of payment in<sup>5</sup>.

A payment into court may be made by the defendant whatever defence he may have pleaded, and if he admits liability in his defence he may still raise issues as to the quantum of damages. For example, he may plead that the words bore a meaning less injurious than that imputed to them by the plaintiff<sup>6</sup>, or he may plead, or give notice of, facts in mitigation of damages<sup>7</sup>.

Except in the following cases, the fact that money has been paid into court may not be inserted in the pleadings or communicated at the trial to the judge or jury until all questions of liability and the amount of damages have been decided<sup>8</sup>:

110 (1) where tender before action, or the now rarely used defence under the Libel Act 1843<sup>9</sup>, is pleaded;

111 (2) where the action is stayed following acceptance of payment into court<sup>10</sup>;

112 (3) where liability has been determined, and damages remain to be tried separately, the fact and date, but not amount, of any payment may be brought to the attention of the court for the purpose of ordering the costs of the issue of liability<sup>11</sup>.

Subject to these exceptions, the judge in exercising his discretion as to costs must take into account the fact and amount of payment<sup>12</sup> and accordingly the fact of any payment made into court should be brought to the judge's attention at, and only at, that stage of argument.

1 Where a true or legal innuendo is pleaded in addition to a claim that the words are defamatory in their natural and ordinary meaning, there are two causes of action: see PARA 179 ante. As to joinder of causes of action see PARA 199 ante.

2 See RSC Ord 22 r 1(1); and PRACTICE AND PROCEDURE. As to the practice in the county court see COURTS vol 10 (Reissue) PARA 701 et seq.

3 RSC Ord 22 r 1(2). For the form of notice see RSC App A, Form 23, which does not specify whether the payment is made with or without liability. Notice must also be given of any increased payment in: RSC Ord 22 r 1(2).

4 The former requirement that the notice of payment in was to state whether liability was admitted or denied (see RSC 1883 Ord XXII r 1(3) (as substituted by RSC (No 1) 1933 and amended by RSC (No 1) 1934)) (now revoked) no longer applies: see RSC Ord 22 r 1(2).

5 RSC Ord 22 r 1(3).

6 *Davis v Billing* (1891) 8 TLR 58, CA.

- 7 *Oxley v Wilkes* [1898] 2 QB 56 at 60, CA. As to pleading facts in mitigation of damages see PARA 237 post.
- 8 See RSC Ord 22 r 7(1).
- 9 See PARA 164 ante; and the Supreme Court Practice 1997 para 82/4/2.
- 10 See RSC Ord 22 rr 3(4), 7(1).
- 11 See RSC Ord 22 r 7(2).
- 12 RSC Ord 62 r 9(b); *Gray v Jones* [1939] 1 All ER 798 (slander action; damages equal to payment in; plaintiff awarded general costs up to payment in, and costs on the issue of liability only thereafter).

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 201 Payment into court

NOTE 3--RSC App A form 23 substituted: SI 1998/1898.

NOTE 12--See *Sugar v Venables* [1998] EMLR 180, CA (libel; payment in accepted outside 21 day time limit; defendant entitled to costs from date of payment in); *Roache v News Group Newspapers Ltd* (1992) [1998] EMLR 161, CA (defendant paid very large sum into court, and plaintiff awarded same sum; defendant was therefore the substantial winner at trial, and entitled to costs from date of payment in).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/202. Taking money out of court.

#### 202. Taking money out of court.

Where money is paid into court, the plaintiff may within 21 days after receipt of the notice of payment in<sup>1</sup> or, where more than one payment is made or the notice amended, receipt of the last notice or amendment, but in any case before the trial or hearing of the action begins, accept the money or the specified part of it in satisfaction of any cause or causes of action to which the payment relates<sup>2</sup>. Where the payment is made or increased after the trial of the action has begun, the plaintiff may accept it in the same way within two days after the receipt of the notice, but in any case before the judge begins his summing up or, if there is no jury, his judgment<sup>3</sup>. On the plaintiff accepting any money paid into court, all further proceedings in respect of the cause or causes of action to which the payment accepted relates must be stayed<sup>4</sup>, but only, in libel and slander actions, as against the defendant making the payment<sup>5</sup>. On the plaintiff's acceptance of a payment into court in satisfaction of his entire claim against the defendant making the payment in, or on his accepting a payment in in satisfaction of one or more causes of action and abandoning any others against that defendant (in either case within the 21-day period), he may tax his costs incurred up to the time of giving notice of acceptance<sup>6</sup> and sign judgment for them against that defendant<sup>7</sup>. Where the payment is accepted after the trial has begun the money will not be paid out except in pursuance of a court order, and the order will deal with the whole costs of the action<sup>8</sup>.

- 1 As to payment into court and the necessary notice see PARA 201 ante.
- 2 RSC Ord 22 r 3(1). For the form of notice of acceptance see RSC App A, Form 24.
- 3 RSC Ord 22 r 3(2).
- 4 See RSC Ord 22 r 3(4).
- 5 See RSC Ord 82 r 4(1); and PARA 203 post. Cf RSC Ord 22 r 3(4) in all other instances.
- 6 RSC Ord 62 r 5(4), (5).
- 7 See RSC Ord 62 r 5(5).
- 8 RSC Ord 22 r 4(3).

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/203. Accepting payments in by one of several defendants.

#### 203. Accepting payments in by one of several defendants.

In an action for libel or slander against more than one defendant sued jointly in which the plaintiff accepts money paid into court by any defendant in satisfaction of his cause of action against that defendant, the action will be stayed as against that defendant only<sup>1</sup>. If the payment was accepted within the due 21-day period, the plaintiff will be entitled to his costs of the action against that defendant, incurred up to the time of giving notice of acceptance<sup>2</sup>. However, the sum recoverable under any judgment for the plaintiff against any other defendant by way of damages must not exceed the amount, if any, by which the amount of the damages exceeds the amount of the payment in so accepted<sup>3</sup>; and the plaintiff will not be entitled to costs against that other defendant unless either the damages awarded exceed the payment so accepted or the judge is of opinion that there were reasonable grounds for him to proceed with the action against that other defendant<sup>4</sup>.

1 RSC Ord 82 r 4(1). This is an exception to the rule in all other actions that the proceedings should be stayed as against all defendants: see RSC Ord 22 r 3(4); and PARA 202 ante.

2 RSC Ord 62 r 5(5).

3 RSC Ord 82 r 4(1)(a).

4 RSC Ord 82 r 4(1)(b). See also *Dering v Uris* [1964] 2 QB 669, [1964] 2 All ER 660, where the plaintiff accepted £500 from one defendant and the others paid £2 into court. On an award of one halfpenny, the court not only awarded those defendants costs as from the payment in, but made no order as to the plaintiff's costs before that time.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/204. Statement in open court after payment into court.

#### **204. Statement in open court after payment into court.**

Where a party wishes to accept money paid into court in satisfaction of a cause of action for libel or slander<sup>1</sup>, that party may, before or after accepting the money, apply to a judge in chambers by summons for leave to make in open court a statement approved by the judge<sup>2</sup>. The form of the statement is, as a matter of practice, usually agreed between the parties before the judge's approval is sought<sup>3</sup>; but there is no requirement that the statement to which approval is sought should in fact be agreed between the parties. Indeed, the opposing party may choose not to attend the hearing of the summons (in which event he will lose the opportunity to object to any part of the statement) and not to participate in the making of the statement in open court.

The opposing party is not entitled to insist that the statement indicates that the payment was made without admission of liability<sup>4</sup>. The statement may refer, not only to the cause of action for libel, slander, malicious prosecution or false imprisonment, but to any other pleaded cause of action<sup>5</sup>.

On the hearing of the summons, the judge has a discretion as to whether or not to allow a statement to be made, and as to its form<sup>6</sup>. The judge will look at all the circumstances and in particular at the relationship between the gravity of the libel and the amount of money paid into court<sup>7</sup>. Where the judge approves the statement he gives leave to make the statement in court on a date specified<sup>8</sup>. If the application was made before acceptance of the payment into court, and the statement approved by the judge is not sufficient for the applicant, the action will proceed without the statement being read.

The statement should normally be made before the judge who approved it, but where the matter is urgent and the judge who approved it is not readily accessible, leave may be obtained from another judge to make the statement before him<sup>9</sup>. In London such statements are normally approved by and read before the judge in charge of the jury list or his deputy<sup>10</sup>.

Where there are several defendants and one or more has or have paid money into court which the plaintiff has accepted<sup>11</sup>, the plaintiff may apply for leave to make a statement in open court as against that defendant (or those defendants), but the judge may in his discretion refuse to allow any statement to be made in open court until after the conclusion of the action against the remaining defendants who have made no payment into court unless he is satisfied that the making of the statement in open court will not prejudice the trial of the action against those defendants<sup>12</sup>.

1 As to payment into court see PARA 201 ante.

2 RSC Ord 82 r 5(1). For the procedure see the Supreme Court Practice 1997 paras 82/5/1-3. As to the other occasion where a statement may be made in open court see PARA 205 post.

3 It is common practice for the plaintiff to indicate to the defendant that he will accept the money in court if the defendant agrees to make a statement in open court in agreed terms and also indemnifies the plaintiff in respect of his legal costs. In that event, the action is in effect settled on agreed terms.

- 4 *Honeyford v Commission for Racial Equality* (1991) Independent, 13 May.
- 5 RSC Ord 82 r 5(3).
- 6 See *Barnet v Crozier* [1987] 1 All ER 1041, [1987] 1 WLR 272, CA, approving *Church of Scientology of California v North News Ltd* (1973) 117 Sol Jo 566, CA, and *J v R* (1984) Times, 23 February.
- 7 *Barnet v Crozier* [1987] 1 All ER 1041, [1987] 1 WLR 272, CA.
- 8 The action cannot be set down for trial since the acceptance of the money in court operates as a stay of all further proceedings: see PARA 202 ante.
- 9 *Liebrich v Cassell & Co Ltd* [1956] 1 All ER 577n, [1956] 1 WLR 249.
- 10 *Listing Statement (Jury Actions in the Royal Courts of Justice)* (1989) Independent, 25 July.
- 11 See PARA 203 ante.
- 12 See *Dering v Uris* [1964] 2 QB 669, [1964] 2 All ER 660n, where leave was given to make a statement in open court, following payment into court by the printers, before the trial against the remaining defendants. See also *Barnet v Crozier* [1987] 1 All ER 1041, [1987] 1 WLR 272, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 204 Statement in open court after payment into court

NOTE 6--The implementation of the CPR has not altered the liability of a defendant, who has made a payment into court, to bear the costs of a claimant who has made a unilateral statement: *Phillipps v Associated Newspapers Ltd* [2004] EWHC 190 (QB), [2004] 2 All ER 455.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/205. Statement in open court on settlement.

### 205. Statement in open court on settlement.

Where a party to an action which is settled before trial<sup>1</sup> desires to make a statement in open court<sup>2</sup>, application must be made to the court for an order that the action be set down for trial, and before the date fixed for the trial the statement must be submitted for the approval of the judge before whom it is to be made<sup>3</sup>. The statement will usually be in terms agreed between the parties.

Notwithstanding such agreement, it is a matter for the judge's discretion whether and in what terms to approve the statement. He will be vigilant to ensure that the statement does not unfairly disadvantage third parties or prejudice other defendants against whom that or a related action is proceeding<sup>4</sup>.

<sup>1</sup> The authority of counsel to settle an action at the trial is discussed elsewhere in this work: see LEGAL PROFESSIONS VOL 66 (2009) PARAS 1136-1139.

2 The terms of settlement will usually include the making of an agreed statement in open court.

3 RSC Ord 82 r 5(2).

4 See *Barnet v Crozier* [1987] 1 All ER 1041, [1987] 1 WLR 272, CA; *Watts v Times Newspapers Ltd (Schilling & Lom (a firm) third party)* [1996] 1 All ER 152, [1996] 2 WLR 427, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(2) INTERLOCUTORY MATTERS/206. Statement in open court upon acceptance of offer of amends.

#### 206. Statement in open court upon acceptance of offer of amends.

If, following the acceptance of a statutory offer of amends<sup>1</sup>, the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer of amends may make the correction and apology by means of a statement in open court in terms approved by the court<sup>2</sup>.

1 See under the Defamation Act 1996 ss 2-4: see PARAS 160-163 ante. At the date at which this volume states the law, ss 2-4 had not been brought into force.

2 See *ibid* s 3(4); and note 1 *supra*. See also PARA 161 ante. As to the principles to be followed in deciding whether, and to what extent, a statement in open court should be approved, see PARAS 204-205 ante; and *Barnet v Crozier* [1987] 1 All ER 1041, [1987] 1 WLR 272, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### 206 Statement in open court upon acceptance of offer of amends

NOTE 1--1996 Act ss 2, 3(1)-(8), (10), 4 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(3) SUMMARY PROCEDURE/207. Introduction.

## (3) SUMMARY PROCEDURE

### 207. Introduction.

In defamation proceedings, the court may dispose summarily of the plaintiff's claim in accordance with the statutory procedure<sup>1</sup>. Such proceedings are heard and determined without a jury<sup>2</sup>.

Provision may be made by rules of court as to the summary disposal of the plaintiff's claim in defamation proceedings<sup>3</sup>. Without prejudice to the generality of that power, provision may be made:

- 113 (1) authorising a party to apply for summary disposal at any stage of the proceedings<sup>4</sup>;
- 114 (2) authorising the court at any stage of the proceedings:
  - 13 20. (a) to treat any application, pleading or other step in the proceedings as an application for summary disposal; or
  - 21. (b) to make an order for summary disposal without any such application<sup>5</sup>;
- 14 115 (3) as to the time for serving pleadings or taking any other step in the proceedings in a case where there are proceedings for summary disposal<sup>6</sup>;
- 116 (4) requiring the parties to identify any question of law or construction which the court is to be asked to determine in the proceedings<sup>7</sup>;
- 117 (5) as to the nature of any hearing on the question of summary disposal, and in particular:
  - 15 22. (a) authorising the court to order affidavits or witness statements to be prepared for use as evidence at the hearing, and
  - 23. (b) requiring the leave of the court for the calling of oral evidence, or the introduction of new evidence, at the hearing<sup>8</sup>;
- 16 118 (6) authorising the court to require a defendant to elect, at or before the hearing, whether or not to make an offer to make amends<sup>9</sup> under the statutory procedure<sup>10</sup>.

1 Defamation Act 1996 s 8(1). At the date at which this volume states the law, s 8 had not been brought into force. See further PARAS 208-209 post.

2 Ibid s 8(5); and see note 1 supra.

3 Ibid s 10(1). At the date at which this volume states the law, s 10 had not been brought into force and consequently no such rules had been made.

4 Defamation Act 1996 s 10(2)(a); and see note 3 supra.

5 Ibid s 10(2)(b); and see note 3 supra.

6 Ibid s 10(2)(c); and see note 3 supra.

7 Ibid s 10(2)(d); and see note 3 supra.

8 Ibid s 10(2)(e); and see note 3 supra.

9 Ie under ibid s 2: see PARA 160 ante. At the date at which this volume states the law, s 2 had not been brought into force.

10 Ibid s 10(2)(f). In relation to Northern Ireland, ss 8, 10 apply only to proceedings in the High Court: see s 11. At the date at which this volume states the law, ss 8-11 had not been brought into force.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

## **207-209 Summary Procedure**

As to the procedure applicable to the summary disposal of claims under the Defamation Act 1996 ss 8, 9, see CPR Pt 53 (added by SI 2000/221). See also *Practice Direction--Defamation Claims* (2000) PD 53.

### **207 Introduction**

NOTES--Defamation Act 1996 ss 2, 8, 10 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(3) SUMMARY PROCEDURE/208. Summary disposal of plaintiff's claim.

### **208. Summary disposal of plaintiff's claim.**

The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried<sup>1</sup>.

In considering whether a claim should be tried the court must have regard to:

- 119 (1) whether all the persons who are or might be defendants in respect of the publication<sup>2</sup> complained of are before the court;
- 120 (2) whether summary disposal of the claim against another defendant would be inappropriate;
- 121 (3) the extent to which there is a conflict of evidence;
- 122 (4) the seriousness of the alleged wrong as regards the content of the statement<sup>3</sup> and the extent of publication; and
- 123 (5) whether it is justifiable in the circumstances to proceed to a full trial<sup>4</sup>.

<sup>1</sup> Defamation Act 1996 s 8(1), (2). At the date at which this volume states the law, s 8 had not been brought into force.

<sup>2</sup> For the meaning of 'publication' see PARA 100 note 2 ante.

<sup>3</sup> For the meaning of 'statement' see PARA 10 note 1 ante.

<sup>4</sup> Defamation Act 1996 s 8(4); and see note 1 supra. As to the procedure see further PARA 207 ante.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

## **207-209 Summary Procedure**



As to the procedure applicable to the summary disposal of claims under the Defamation Act 1996 ss 8, 9, see CPR Pt 53 (added by SI 2000/221). See also *Practice Direction--Defamation Claims* (2000) PD 53.

## 208 Summary disposal of plaintiff's claim

NOTE 1--1996 Act s 8 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(3) SUMMARY PROCEDURE/209. Judgment for the plaintiff for summary relief.

## 209. Judgment for the plaintiff for summary relief.

The court may give judgment for the plaintiff and grant him summary relief if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried<sup>1</sup>. For these purposes, 'summary relief' means such of the following as may be appropriate:

- 124 (1) a declaration that the statement<sup>2</sup> was false and defamatory of the plaintiff<sup>3</sup>;
- 125 (2) an order that the defendant publish<sup>4</sup> or cause to be published a suitable correction and apology<sup>5</sup>;
- 126 (3) damages not exceeding £10,000 or such other amount as may be prescribed by order<sup>6</sup> of the Lord Chancellor<sup>7</sup>;
- 127 (4) an order restraining the defendant from publishing or further publishing the matter complained of<sup>8</sup>.

Unless the plaintiff asks for summary relief, the court may not act under these provisions unless it is satisfied that summary relief will adequately compensate him for the wrong he has suffered<sup>9</sup>.

1 Defamation Act 1996 s 8(1), (3). As to the matters to which the court must have regard in considering whether a claim should be tried see s 8(4); and PARA 208 heads (1)-(5) ante. At the date at which this volume states the law, s 8 had not been brought into force.

2 For the meaning of 'statement' see PARA 10 note 1 ante.

3 Defamation Act 1996 s 9(1)(a). At the date at which this volume states the law, s 9 had not been brought into force.

4 For the meaning of 'publish' and 'publication' see PARA 100 note 2 ante.

5 Defamation Act 1996 s 9(1)(b); and see note 3 supra. The content of any correction and apology, and the time, manner, form and place of publication, are for the parties to agree; if they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court in accordance with rules of court: s 9(2). If they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as the court considers appropriate: s 9(2). As to commencement of s 9 see note 3 supra.

6 Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: *ibid* s 9(3). At the date at which this volume states the law, s 9 had not been brought into force and consequently no such order had been made.

7 *Ibid* s 9(1)(c); and see note 3 supra.

8 Ibid s 9(1)(d); and see note 3 supra.

9 Ibid s 8(3); and see note 1 supra. As to the procedure see further PARA 207 ante.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **207-209 Summary Procedure**

As to the procedure applicable to the summary disposal of claims under the Defamation Act 1996 ss 8, 9, see CPR Pt 53 (added by SI 2000/221). See also *Practice Direction--Defamation Claims* (2000) PD 53.

### **209 Judgment for the plaintiff for summary relief**

NOTES--Defamation Act 1996 ss 8, 9 in force 28 February 2000: SI 2000/222.

NOTE 1--See *James Gilbert Ltd v MGN Ltd* [2000] EMLR 680 (allegations had not been adequately verified and were not in the public interest; claimant granted summary relief).

TEXT AND NOTES 3-8--See further Defamation Act 1996 s 9(2A)-(2D) (added by Constitutional Reform Act 2005 Sch 4 para 255).

TEXT AND NOTE 7--The Lord Chancellor's function under the Defamation Act 1996 s 9(1) (c) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/210. Discovery of documents in actions of libel and slander.

## **(4) DISCOVERY AND INTERROGATORIES**

### **210. Discovery of documents in actions of libel and slander.**

In an action of libel or slander, as in other actions begun by writ<sup>1</sup>, there must be discovery by the parties of relevant documents which are or have been in their possession, custody or power<sup>2</sup>. The court may order any party to a cause or matter to make and serve on any other party a list of such documents and at the same time or subsequently may order him to make and file an affidavit verifying the list and serve a copy of it on the other party<sup>3</sup>. A party may not use a document disclosed in an action as the basis for any subsequent defamation action<sup>4</sup> unless that party has been released from the implied undertaking against using disclosed documents for a collateral purpose<sup>5</sup>.

In actions against a newspaper where publication is admitted, an order for inspection of an original manuscript will not normally be made<sup>6</sup>. Where the only issue is publication by the

defendant, he may be permitted to cover up the name and address of the writer who is a third person<sup>7</sup>.

1 As to discovery of documents see PRACTICE AND PROCEDURE; see also *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA.

2 See PRACTICE AND PROCEDURE.

3 See PRACTICE AND PROCEDURE.

4 *Riddick v Thames Board Mills Ltd* [1977] QB 881, [1977] 3 All ER 677, CA.

5 See *Sybron Corp v Barclays Bank plc* [1985] Ch 299, [1984] 3 WLR 1055; *Crest Homes plc v Marks* [1987] AC 829, [1987] 2 All ER 1074, HL; *Dory v Wolf GmbH* [1990] FSR 266. By RSC Ord 24 r 14A the undertaking ceases to apply after the document is read in open court, unless the court for special reasons otherwise orders on the application of a party or the person to whom the document belongs. It has, nevertheless, been held to be an abuse of process to base a libel action on a disclosed document read out in open court: see *Singh (Tejendra) v Christie* [1993] TLR 561 per Drake J (queried in *Mahon v Rahn* (1997) Times, 12 June, CA).

6 See *Hope v Brash* [1897] 2 QB 188, CA.

7 See *Blanc v Burrows* (1896) 12 TLR 521, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 210 Discovery of documents in actions of libel and slander

NOTE 5--*Mahon v Rahn*, cited, reported at [1997] 3 All ER 687.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/211. Discovery strictly confined to particulars.

### 211. Discovery strictly confined to particulars.

When justification or fair comment is pleaded, the plaintiff's obligation to give discovery in relation to them is confined to the facts and matters pleaded in the particulars; he is not obliged to give discovery in relation to matters not pleaded, nor is the defendant permitted to fish for a case he has not pleaded<sup>1</sup>. Where a defendant pleads, as the meaning he seeks to justify, that there are reasonable grounds to suspect the plaintiff of some misconduct, the defendant must disclose not only documents relevant to his pleaded particulars, but also any other documents in his possession, custody or control tending to show whether or not that suspicion was well founded<sup>2</sup>.

1 See *Zierenberg v Labouchere* [1893] 2 QB 183, CA; *Yorkshire Provident Life Assurance Co v Gilbert and Rivington* [1895] 2 QB 148, CA; *Maisel v Financial Times Ltd* (1915) 84 LJB 2145, HL (in which the width of the plaintiff's pleaded meaning widened the scope of the particulars of justification and consequent discovery and evidence).

2 *Evans v Granada Television Ltd* [1996] EMLR 429, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/212. Discovery of name of printer, publisher or proprietor of newspaper.

#### 212. Discovery of name of printer, publisher or proprietor of newspaper.

A defendant in an action for a libel contained in a newspaper can be compelled to make discovery of the name of any person concerned as printer, publisher or proprietor of any newspaper, or of any matters relative to the printing and publishing of any newspaper, in order to enable a person who alleges that he has suffered damage by reason of any slanderous or libellous matter contained in the newspaper to bring or carry on any suit or action to recover compensation for that damage more effectually<sup>1</sup>. Such discovery may not be made use of as evidence or otherwise in any proceeding against the defendant, except in the action for which it is made<sup>2</sup>.

In exceptional circumstances, the equitable action for discovery against a person mixed up in another's wrongdoing may be used to obtain disclosure of the authors and contents of a defamatory statement<sup>3</sup>, but such an application may not be made against a mere witness not involved in the wrongdoing<sup>4</sup>.

1 6 & 7 Will 4 c 76 (Stamp Duties on Newspapers) (1836) s 19 (continued in force by the Newspapers, Printers and Reading Rooms Repeal Act 1869 s 1, Sch 2); and see *Hillman's Airways Ltd v SA d'Editions Aéronautiques Internationales* [1934] 2 KB 356.

2 6 & 7 Will 4 c 76 (Stamp Duties on Newspapers) (1836) s 19 proviso (as continued in force: see note 1 supra); see also *Riddick v Thames Board Mills Ltd* [1977] QB 881, [1977] 3 All ER 677, CA.

3 *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL; *P v T Ltd* [1997] TLR 250 per Scott V-C; and see PRACTICE AND PROCEDURE.

4 See *Ricci v Chow* [1987] 3 All ER 534, [1987] 1 WLR 1658, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/213. Protection for sources of published information.

### 213. Protection for sources of published information.

No court<sup>1</sup> may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication<sup>2</sup> for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime<sup>3</sup>.

1 For these purposes, 'court' includes any tribunal or body exercising the judicial power of the state: Contempt of Court Act 1981 s 19.

2 'Publication' includes any speech, writing, programme included in a service, or other communication in whatever form, which is addressed to the public at large or any section of the public: *ibid* s 2(1) (amended by the Broadcasting Act 1990 s 203(1), Sch 20 para 31(1); applied by the Contempt of Court Act 1981 s 19).

3 *Ibid* s 10. See further CONTEMPT OF COURT; and see in particular *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, [1990] 2 All ER 1, HL; *Goodwin v United Kingdom* [1996] TLR 189, ECtHR.

### UPDATE

#### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/214. Interrogatories as to publication of words complained of.

### 214. Interrogatories as to publication of words complained of.

In an action for libel, the defendant may be interrogated<sup>1</sup> as to whether he did not write, print, speak or publish all or some and which of the words set out in the statement of claim, or words to the same effect<sup>2</sup>. The defendant may object in his affidavit that the answer would tend to incriminate himself or his spouse, since publishing a libel is a criminal offence<sup>3</sup>. The defendant may interrogate as to the alleged publication by him of the libel<sup>4</sup>. In an action for slander, a plaintiff who has alleged publication to specified persons on or about a specified date may interrogate the defendant as to whether or not he did on or about that date speak those words, or words to the same effect, to the specified persons or any and which of them<sup>5</sup>. If the defendant has pleaded that he spoke the words at the plaintiff's invitation, he may be asked how or when he was so invited<sup>6</sup>.

An interrogatory asking, in substance, whether the defendant intended the words to bear a meaning attributed to them by an innuendo will not be allowed<sup>7</sup>, although it is sometimes permitted to interrogate as to whether the words complained of did not refer to the plaintiff<sup>8</sup>.

1 As to interrogatories generally see RSC Ord 26; and PRACTICE AND PROCEDURE.

2 *Dalglish v Lowther* [1899] 2 QB 590, CA. Cf *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA; *Greenfield v Reay* (1875) LR 10 QB 217. See also *Jones v Richards* (1885) 15 QBD 439, DC (interrogatory as to authorship of another document permitted to prove handwriting).

3 *Lamb v Munster* (1882) 10 QBD 110, DC; *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA; *Fisher v Owen* (1878) 8 ChD 645, CA. As to criminal libel see PARA 288 et seq post.

- 4 *Tangyes v Irman SS Co* (1889) 88 LT Jo 32.
- 5 *Dagleish v Lowther* [1899] 2 QB 590, CA; *Saunderson v Baron Von Radeck* (1905) 119 LT Jo 33, HL; *Barham v Lord Huntingfield* [1913] 2 KB 193, CA; *Atkinson v Fosbroke* (1866) LR 1 QB 628.
- 6 *Barratt v Kearns* [1905] 1 KB 504, CA.
- 7 *Heaton v Goldney* [1910] 1 KB 754, CA (disapproving *Foster v Perryman* (1891) 8 TLR 115); *Franklin v Daily Mirror Newspapers Ltd* (1933) 149 LT 433, CA. As to pleading innuendo see PARAS 179-182 ante.
- 8 *Wilton v Brignell* [1875] WN 239. See also *Spiers and Pond Ltd v John Bull Ltd* (1916) 85 LJKB 992, CA.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/215. Interrogatories as to printer, publisher, proprietor or author.

#### 215. Interrogatories as to printer, publisher, proprietor or author.

In an action for libel in a newspaper, the defendant may be interrogated as to whether he was not, at the date of the alleged publication, the printer, proprietor or publisher of the newspaper, and, in view of the statutory protection afforded to the printer, publisher and proprietor<sup>1</sup>, the defendant may not object to answering on the ground of possible incrimination<sup>2</sup>. The author of the alleged libel and the editor of the newspaper, not being within that protection, may object on the ground that his answer might tend to incriminate him<sup>3</sup>. The plaintiff in such an action may interrogate the defendant for the purpose of ascertaining the name of any other person concerned as printer, publisher or proprietor of the newspaper containing the libel even if the information is sought with a view to bringing an action against the person whose name is sought<sup>4</sup>.

In an action against a newspaper or a trade periodical, where responsibility for publication of the alleged libel is admitted, the practice, in the absence of any special reason to the contrary, is to refuse to compel the disclosure<sup>5</sup> of the name of the person who wrote the alleged libel or to compel the defendant to answer as to the possession or contents of the manuscript<sup>6</sup>, especially if this would tend to disclose the identity of the source of information contained in the publication<sup>7</sup>.

1 See 6 & 7 Will 4 c 76 (Stamp Duties on Newspapers) (1836) s 19 proviso (continued in force by the Newspapers, Printers and Reading Rooms Repeal Act 1869 s 1, Sch 2); and PARA 212 text to note 2 ante.

2 *Ramsden v Brearley* (1875) 33 LT 322; *Lefroy v Burnside* (1879) 41 LT 199.

3 *Carter v Leeds Daily News* [1876] WN 11.

4 *Hillman's Airways Ltd v SA d'Editions Aéronautiques Internationales* [1934] 2 KB 356.

5 As to discovery of documents see PARA 210 text and notes 6-7 ante.

6 *Lyle-Samuel v Odhams Ltd* [1920] 1 KB 135, CA; *South Suburban Co-operative Society Ltd v Orum* [1937] 2 KB 690, [1937] 3 All ER 133, CA; *Lawson and Harrison v Odhams Press Ltd* [1949] 1 KB 129, [1948] 2 All ER 717, CA; *Georgius v Vice-Chancellor and Delegates of Oxford University Press* [1949] 1 KB 729, [1949] 1 All ER 342, CA; *Mackenzie v Steinkoff* (1890) 54 JP 327, DC.

7 See the Contempt of Court Act 1981 s 10; and PARA 213 ante.

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### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/216. Interrogatories as to circulation or distribution.

#### 216. Interrogatories as to circulation or distribution.

It has formerly been held that interrogatories as to the extent of circulation of the defendant's newspaper are allowable only in the case of a newspaper about the circulation of which nothing is known<sup>1</sup>, and that it is oppressive to interrogate as to the names of those to whom an alleged defamatory book has been supplied or shown<sup>2</sup>. In modern conditions, when extensive computer records of such matters are widely kept and readily accessible, such interrogatories may be ordered in an appropriate case, though the information is likely to be obtained on documentary discovery.

1 *Whittaker v Scarborough Post Newspaper Co* [1896] 2 QB 148, CA, overruling *Parnell v Walter* (1890) 24 QBD 441, DC, and *James v Carr* (1890) 7 TLR 4, DC. See also *Rumney v Walter and Wright* (1891) 61 LJQB 149, DC.

2 *White & Co v Credit Reform Association and Credit Index Ltd* [1905] 1 KB 653, CA.

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### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/217. Interrogatories as to malice.

#### 217. Interrogatories as to malice.

Where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief are allowed<sup>1</sup>. However, the rule

does not expressly prohibit interrogatories going to the information<sup>2</sup> or belief<sup>3</sup> itself, as opposed to its sources or grounds, so interrogatories on these matters may be permissible provided they do not contravene the rule<sup>4</sup>. Moreover, interrogatories will be permissible if they relate to the facts or matters, pleaded in the reply, from which malice is to be inferred<sup>5</sup>.

1 RSC Ord 82 r 6. As to the sources of information see PARA 213 ante.

2 See eg *Edmondson v Birch & Co Ltd* [1905] 2 KB 523, CA; *Plymouth Mutual Co-operative and Industrial Society Ltd v Traders' Publishing Association Ltd* [1906] 1 KB 403, CA (both cases based on the common law principle which preceded the rule).

3 *Adams v Sunday Pictorial Newspapers (1920) Ltd and Champion* [1951] 1 KB 354 at 360, [1951] 1 All ER 865 at 868, CA, per Denning LJ. See also *Dembinsky v TCS Ltd* (1930) 74 Sol Jo 457, CA.

4 The following cases illustrate the common law position before 1949 when the restriction was introduced: *Elliott v Garrett* [1902] 1 KB 870, CA; *White & Co v Credit Reform Association and Credit Index Ltd* [1905] 1 KB 653, CA; *Maass v Gas Light and Coke Co* [1911] 2 KB 543, CA; *Hennessy v Wright (No 2)* (1888) 24 QBD 445n, CA; *Martin v Trustees of British Museum and Thompson* (1893) 10 TLR 215, DC; *Parnell v Walter* (1890) 24 QBD 441, DC; *Hope v Brash* [1897] 2 QB 188, CA; *Korda v Odhams Press Ltd* [1948] WN 376, CA; *Whateley v Crowter (Crawford)*, *Carew v Davies* (1855) 5 E & B 709; *Marriott v Chamberlain* (1886) 17 QBD 154, CA; *Hooton v Dalby* [1907] 2 KB 18, CA; *Lever Bros v Associated Newspapers* [1907] 2 KB 626, CA; *Ridgway v Smith & Son* (1890) 6 TLR 275, DC; *Caryll v Daily Mail Publishing Co* (1904) 90 LT 307, CA; *Arnold and Butler v Bottomley* [1908] 2 KB 151, CA.

5 *Dawson v Dover and County Chronicle Ltd* (1913) 108 LT 481 at 488, CA, per Farwell LJ. See also *Caryll v Daily Mail Publishing Co* (1904) 90 LT 307, CA (previous statements made by defendant); and see PARA 152 note 2 ante.

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### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/218. Interrogatories as to truth of statements.

### 218. Interrogatories as to truth of statements.

Where justification is pleaded, the defendant may interrogate as to any facts material to his defence and within his particulars of justification; and the plaintiff may interrogate the defendant as to any facts proof of which will destroy the defence<sup>1</sup>. Under a plea of fair comment<sup>2</sup>, all proper interrogatories served with the object of obtaining admissions of the truth of the material statements of fact forming part of the words complained of are relevant and ought to be allowed<sup>3</sup>; and interrogatories ought to be allowed which go to show the truth of particulars of other facts and matters on which the comment was based<sup>4</sup>. Such interrogatories will not, however, generally be allowed until after service of the plaintiff's reply<sup>5</sup>, admitting or denying the particulars of justification and fair comment in the defence, and may be postponed until after discovery or service of witness statements<sup>6</sup>.

1 *Gourley v Plimsoll* (1873) LR 8 CP 362; *Yorkshire Provident Life Assurance Co v Gilbert and Rivington* [1895] 2 QB 148, CA; *Arnold and Butler v Bottomley* [1908] 2 KB 151, CA.



2 As to pleading fair comment see PARA 191 ante.

3 *Peter Walker & Son Ltd v Hodgson* [1909] 1 KB 239, CA.

4 *Kemsley v Foot* [1952] AC 345, [1952] 1 All ER 501, HL; *Burton v Board* [1929] 1 KB 301, CA; and see the Defamation Act 1952 s 6; and PARA 140 ante.

5 See RSC Ord 82 r 3(2A); and PARA 196 ante.

6 As to interrogatories see generally *Hall v Sevalco* [1996] PIQR P344, [1996] TLR 183, CA, approving *Det Danske Hedeselskabet v KDM International plc* [1994] 2 Lloyd's Rep 534.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/219. Interrogatories as to previous or similar statements.

#### 219. Interrogatories as to previous or similar statements.

A plaintiff may interrogate as to previous or similar statements made by the defendant which appear relevant to malice<sup>1</sup>. A defendant may not ask whether other similar libels have been published and remain uncontradicted, even where the defendant pleads justification<sup>2</sup>, nor may he interrogate as to the truth of similar libels where the only defence is fair comment<sup>3</sup>.

1 See PARA 217 ante, especially note 5. See also PARA 152 note 2 ante.

2 *Pankhurst v Hamilton* (1886) 2 TLR 682, DC.

3 *Lord Hindlip v Mudford* (1890) 6 TLR 367.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/220. Interrogatories generally.

#### 220. Interrogatories generally.

The plaintiff may not interrogate with a view to finding out how the defendant intends to make out his defence<sup>1</sup>. The defendant is not entitled to interrogate as to the plaintiff's evidence, nor how he intends to shape his case, so that he may not, after pleading fair comment, ask

whether the plaintiff intends to rely on express malice, and if so upon what facts and circumstances he will rely to show it<sup>2</sup>, nor, after pleading justification, interrogate with a view to enabling himself to give particulars of it<sup>3</sup>. In other words he cannot carry out a 'fishing expedition'.

1 *Ridgway v Smith & Son* (1890) 6 TLR 275, DC.

2 *Lever Bros v Associated Newspapers* [1907] 2 KB 626, CA, not following *Cooper v Blackmore* (1886) 2 TLR 746.

3 *Zierenberg v Labouchere* [1893] 2 QB 183, CA; cf *Waynes Merthyr Co v Radford & Co* [1896] 1 Ch 29.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(4) DISCOVERY AND INTERROGATORIES/221. Interrogatories as to damages.

#### 221. Interrogatories as to damages.

In an action for libel or slander where special damage is in issue, interrogatories as to quantum of damage are allowable<sup>1</sup>. Where the defendant does not assert the truth of the statement complained of but has furnished particulars as to matters on which he intends to give evidence in mitigation of damages<sup>2</sup>, he may serve interrogatories limited to those matters<sup>3</sup>.

1 *Marriott v Chamberlain* (1886) 17 QBD 154 at 162-164, CA; *Scaife v Kemp & Co* [1892] 2 QB 319. As to special damage see PARAS 257-259 post.

2 See under RSC Ord 18 r 12(1)(c); as to pleading mitigation of damage see PARA 194 ante.

3 *Yorkshire Provident Life Assurance Co v Gilbert and Rivington* [1895] 2 QB 148, CA; *Scaife v Kemp & Co* [1892] 2 QB 319; *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1, CA; *Arnold and Butler v Bottomley* [1908] 2 KB 151, CA; *Tucker v Lawson* (1886) 2 TLR 593, DC; *Beyfus v Jonas* (1886) 2 TLR 687.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT/222. Court's inherent power to dismiss action.

## **(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT**

### **222. Court's inherent power to dismiss action.**

The court has an inherent power to dismiss an action, even before defence, on the ground that it is frivolous and vexatious, and it is not necessary for the exercise of that power that the statement of claim should be on the face of it demurrable<sup>1</sup>; the power may be exercised if, on facts which are brought before the court (either on the face of the statement of claim or otherwise) or of which the court may take judicial notice, the action is clearly shown to be frivolous and vexatious<sup>2</sup>.

<sup>1</sup>     le not sustainable in law.

<sup>2</sup>     *Burr v Smith* [1909] 2 KB 306 at 313, CA; *Law v Llewellyn* [1906] 1 KB 487, CA; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, Ex Ch; affd (1875) LR 7 HL 744. See also PARA 225 post.

### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT/223. Dismissal and striking out on preliminary issue.

### **223. Dismissal and striking out on preliminary issue.**

Any point of law may be raised by a party to an action in his pleading<sup>1</sup>. The court may order any question or issue arising in a cause or matter, whether of law or fact or partly of each, and whether raised by pleading or otherwise, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue is to be stated<sup>2</sup>. If it appears to the court that the decision of any question or issue tried separately substantially disposes of the cause or matter, or renders its trial unnecessary, it may dismiss it or make such other order or give such judgment in it as may be just<sup>3</sup>.

Preliminary issues may be ordered in defamation actions where they would save costs without occasioning unjustified delay<sup>4</sup>, but because in libel and slander actions either party has a right to jury trial<sup>5</sup>, preliminary issues on disputed questions of fact are seldom ordered. Even where the right to jury trial does not apply, any question involving malice is unlikely to be suitable for a preliminary issue<sup>6</sup>. The same applies to the question whether an absolute privilege exists, at least where the point is a novel one or may require extensive inquiry into facts<sup>7</sup>. On the other hand, if there is a point of law requiring serious discussion, this course should be adopted rather than an application to strike out a pleading<sup>8</sup>.

<sup>1</sup>     RSC Ord 18 r 11.

<sup>2</sup>     RSC Ord 33 r 3.

<sup>3</sup>     RSC Ord 33 r 7. See further PRACTICE AND PROCEDURE.

4 *Keays v Murdoch Magazines (UK) Ltd* [1991] 4 All ER 491, [1991] 1 WLR 1184, CA (preliminary issue to determine whether the words complained of were capable of bearing the defamatory meaning alleged by the plaintiff); superseded as to preliminary issues on meaning by RSC Ord 82 r 3A: see PARA 224 post.

5 See the Supreme Court Act 1981 s 69(1); and PARA 168 ante.

6 *Kirby-Harris v Baxter* [1995] EMLR 516, CA (a libel action concerning the National Health Service in which the statutory immunity from suit under the Public Health Act 1875 was pleaded).

7 *Richards v Naum* [1967] 1 QB 620, [1966] 3 All ER 812, CA (communications within allied forces); *Constable v Jagger* (1972) Times, 16 March, CA (police inquiry).

8 *Kemsley v Foot* [1951] 2 KB 34 at 39, [1951] 1 All ER 331 at 333, CA; on appeal without affecting this point [1952] AC 345, [1952] 1 All ER 501, HL.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 223 Dismissal and striking out on preliminary issue

NOTE 2--A judge is entitled to hear issues of privilege and malice as preliminary issues: *GKR Karate UK Ltd v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931, CA.

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT/224. Ruling on meaning.

### 224. Ruling on meaning.

At any time after the service of the statement of claim, either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings<sup>1</sup>. If it appears to the judge on the hearing of such an application that none of the words complained of is capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim, or make such other order or give such judgment in the proceedings as may be just<sup>2</sup>. This rule applies to counterclaims for libel and slander as well as to claims<sup>3</sup>. Such an application may be made only once by each party<sup>4</sup>; but where, following such an application, the respondent to it amends his pleadings to allege a new meaning, the court may allow the applicant to make a fresh application in relation to that new meaning<sup>5</sup>.

In defamation proceedings the court may not be asked to rule whether a statement<sup>6</sup> is arguably capable, as opposed to capable, of bearing a particular meaning or meanings attributed to it<sup>7</sup>.

1 RSC Ord 82 r 3A. As to the circumstances in which a defamatory meaning should be pleaded by plaintiff or defendant see PARA 175 et seq ante. As to what is meant by 'capable of being defamatory' see PARA 238 post. This rule supersedes the practice of seeking a preliminary issue on meaning as considered in *Keays v Murdoch Magazines (UK) Ltd* [1991] 4 All ER 491, [1991] 1 WLR 1184, CA.

2 RSC Ord 82 r 3A(2). It is common practice, if a meaning is struck out, to allow the respondent time to formulate another meaning and seek leave to amend. A judge asked to rule whether words complained of were capable of bearing the meaning alleged by the plaintiff should evaluate the words complained of and delimit the range of meanings of which they were reasonably capable, exercising his own judgment in the light of the authorities; the decision should not be treated in the same way as an application to strike out part of the proceedings: see *Mapp v News Group Newspapers Ltd* [1997] NLJR 562, [1997] TLR 124, CA.

3 RSC Ord 82 r 3A(5).

4 RSC Ord 82 r 3A(3).

5 RSC Ord 82 r 3A(4).

6 For the meaning of 'statement' see PARA 10 note 1 ante.

7 Defamation Act 1996 s 7. At the date at which this volume states the law, s 7 had not been brought into force. Prior to *Keays v Murdoch Magazines (UK) Ltd* [1991] 4 All ER 491, [1991] 1 WLR 1184, CA, the court would not hear applications for a ruling on whether the words were capable of bearing a given defamatory meaning, that being a matter for the trial judge, but would strike out meanings that were not even arguably capable of being borne by the words. To avoid duplication of proceedings, that practice is now excluded.

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### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 224 Ruling on meaning

NOTE 1--See also *Cruise v Express Newspapers plc* [1999] 2 WLR 327, CA (judges ought to be unwilling to grant leave to appeal against interlocutory proceedings under RSC Ord 82 r 3A). On appeal, the Court of Appeal should be less reluctant to interfere where a meaning is ruled out by a judge than where it has been left to be decided by jury: *Geenty v Channel Four Television Corp* [1998] EMLR 524, CA.

NOTE 2--*Mapp v News Group Newspapers*, cited, now reported at [1998] 2 WLR 260, CA. The question is what meaning the words are capable of bearing; it is for the jury to determine what meaning they actually bear: *Hinduja v Asia TV Ltd* [1998] EMLR 516, CA.

NOTE 7--1996 Act s 7 in force 28 February 2000: SI 2000/222.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT/225. Striking out pleadings and consequential dismissal.

### 225. Striking out pleadings and consequential dismissal.

The court may at any stage of the proceedings order to be struck out or amended any pleading or indorsement on a writ on the ground that (1) it discloses no reasonable cause of action or defence<sup>1</sup>; (2) it is scandalous, frivolous or vexatious<sup>2</sup>; (3) it may prejudice, embarrass or delay the fair trial of the action<sup>3</sup>; or (4) it is otherwise an abuse of the process of the court<sup>4</sup>. These rules should only be applied in plain and obvious cases<sup>5</sup>. Thus, a statement of claim or matter in it will not be struck out on the ground that the words are incapable of a defamatory meaning where it is possible that a reasonable jury may find them defamatory<sup>6</sup>. However, a statement of

claim or matter in it may be struck out on the ground that the action is frivolous and vexatious<sup>7</sup>; and, in cases where it is clear that the facts relied on do not support the innuendo, the court may strike out the statement of claim, if an innuendo is necessary, as disclosing no reasonable cause of action<sup>8</sup>. Moreover, a statement of claim may on its face clearly raise a question of law<sup>9</sup> and, on that question being decided against the plaintiff, the statement of claim may be struck out as disclosing no reasonable cause of action<sup>10</sup>.

There may well be cases in which, following exchange of witness statements, it is possible to demonstrate that the pleaded case is hopeless and incapable of being proved. In such circumstances, the pleading could be struck out in whole or part, at an interlocutory stage or at the outset of the trial; but before doing so, the court would consider all the sources of evidence that might become available to the party pleading, including evidence obtained by cross-examination<sup>11</sup>.

1 RSC Ord 18 r 19(1)(a).

2 RSC Ord 18 r 19(1)(b). See also PARA 222 ante.

3 RSC Ord 18 r 19(1)(c).

4 RSC Ord 18 r 19(1)(d).

5 *Moore v Lawson* (1915) 31 TLR 418, CA; *Kemsley v Foot* [1951] 2 KB 34 at 39, [1951] 1 All ER 331 at 333, CA; on appeal without affecting this point [1952] AC 345, [1952] 1 All ER 501, HL. See now *McDonald's Corp v Steel* [1995] 3 All ER 615, CA.

6 *Moore v Lawson* (1915) 31 TLR 418, CA; *Greenslade v Swaffer* [1955] 3 All ER 200, [1955] 1 WLR 1109, CA; *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, [1970] 1 WLR 688, CA.

7 *Emerson v Grimsby Times and Telegraph Co Ltd* (1926) 42 TLR 238, CA. See also PARA 222 ante.

8 *Greenslade v World's Press News Publishing Co Ltd* [1955] 3 All ER 200, [1955] 1 WLR 1109, CA; *Michael v Spiers and Pond Ltd* (1909) 101 LT 352; *Hellwig v Mitchell* [1910] 1 KB 609; *Astaire v Campling* [1965] 3 All ER 666, [1966] 1 WLR 34, CA; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL. See also *Jackson v Adams* (1835) 2 Bing NC 402; *Craft v Boite* (1669) 1 Wms Saund (1871 Edn) 310 at 316n (ix).

9 As to the disposal of a point of law before trial see PARA 223 ante.

10 *Hodson v Pare* [1899] 1 QB 455, CA, where the statement of claim showed that the occasion of publication was absolutely privileged.

11 *McDonald's Corp v Steel* [1995] 3 All ER 615, CA.

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### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT/226. Striking out for want of prosecution.

### 226. Striking out for want of prosecution.

In common with all actions, a defamation action may be struck out for want of prosecution if the defendant can show either contumelious disregard of an order of the court or inordinate and inexcusable delay resulting in serious prejudice to the defendant<sup>1</sup>. Such applications are not likely to succeed unless the limitation period has expired<sup>2</sup> and since that period in defamation is only 12 months<sup>3</sup>, there is greater scope for such applications. Furthermore, since the object of libel or slander proceedings is to vindicate the plaintiff's good name, such actions should be pursued promptly, and the court will be especially ready to infer abuse of process and prejudice from delay<sup>4</sup>.

1 As to striking out for want of prosecution see generally PRACTICE AND PROCEDURE. See also LIMITATION PERIODS vol 68 (2008) PARA 906.

2 *Birkett v James* [1978] AC 297, [1978] 2 All ER 801, HL.

3 See the Defamation Act 1996 s 5(1); and PARA 167 ante. Because legal aid is not available in defamation proceedings, the court will be sympathetic to a plaintiff whose delay was occasioned by want of means: *Gilberthorpe v Hawkins* [1995] TLR 179.

4 See *Grovit v Doctor* [1997] 2 All ER 417, HL.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 226 Striking out for want of prosecution

NOTE 4--See *Steedman v British Broadcasting Corpn* (2001) Times, 13 December, CA (opportunity to vindicate claimant's reputation deemed to be of little value when proceedings issued over a year after alleged defamatory broadcast).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(5) DISMISSAL OF ACTION, STRIKING OUT PLEADING AND ABATEMENT/227. Abatement of action on death of parties.

### 227. Abatement of action on death of parties.

On the death of either party<sup>1</sup> to an action of libel or slander, the action abates even where special damage has accrued to the estate of the plaintiff<sup>2</sup>. However, there is no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment; and judgment may be given in such a case notwithstanding the death<sup>3</sup>.

1 As to the position of the personal representative of a deceased plaintiff see PARA 29 ante.

2 *Chamberlain v Williamson* (1814) 2 M & S 408 at 415; *Pulling v Great Eastern Rly Co* (1882) 9 QBD 110.

3 RSC Ord 35 r 9; and see the Supreme Court Practice 1997 para 15/7/7. For the procedure on the death of either party after final judgment see EXECUTORS AND ADMINISTRATORS vol 17(2) PARA 823. See further PRACTICE AND PROCEDURE.

## UPDATE

## 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/228. Proof of publication.

### (6) TRIAL

#### (i) Evidence

##### A. PLAINTIFF'S CASE

##### 228. Proof of publication.

The defendant has a right to show the court the whole of the publication from which the words complained of arise<sup>1</sup>. However, it is for the judge to determine the extent of the publication and whether the passages to be read or otherwise exhibited are part of the same publication as the words complained of<sup>2</sup>. For example, if the words were published in a newspaper, he need not admit other paragraphs from that edition bearing no relation to the words complained of<sup>3</sup>.

If the words as set out in the statement of claim are materially qualified by words not contained in the statement of claim, it is a 'variance', even though the words as qualified are still defamatory<sup>4</sup>. However, it is sufficient for the plaintiff to prove part only of a sentence set out in the statement of claim if the remainder does not qualify the part proved, and the part proved is intelligible of itself and actionable<sup>5</sup>. So, where the statement of claim sets out distinct allegations of slander, the plaintiff is entitled to a verdict on those which he establishes<sup>6</sup>, but, where the whole of the statement as set out in the pleadings constitutes one charge, the whole must be proved<sup>7</sup>.

If the plaintiff is unable to prove the exact words alleged, but does prove words substantially similar, he may be granted leave to amend even in the course of the trial<sup>8</sup>.

1 *Cooke v Hughes* (1824) Ry & M 112. See further *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, [1995] 2 All ER 313, HL.

2 See *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL.

3 *Darby v Ouseley* (1856) 1 H & N 1; see also *Hedley v Barlow* (1865) 4 F & F 224; *Bolton v O'Brien* (1885) 16 LR 97. But a passage in the same newspaper may be read, if referred to in the words complained of: *Thornton v Stephen* (1837) 2 Mood & R 45. See also *Strauss v Francis* (1866) 4 F & F 939 (defamatory book review; plaintiff's failure to put in evidence book reviewed).

4 *Rainy v Bravo* (1872) LR 4 PC 287; cf *Bourke v Warren* (1826) 2 C & P 307, and *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA.

5 *Orpwood v Barks* (1827) 4 Bing 261.

6 *Flower v Pedley* (1796) 2 Esp 489; cf *Compagnon v Martin* (1772) 2 Wm BI 790.

7 *Flower v Pedley* (1796) 2 Esp 489.

8 As to amendments see PARA 197 ante.



## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/229. Proof by secondary evidence.

#### 229. Proof by secondary evidence.

In an action for defamation, it is not sufficient for a witness who does not recall the words accurately to depose to the impression made on his mind by a conversation<sup>1</sup> or the reading of written matter<sup>2</sup>. If he did he would usurp the functions of the judge and jury<sup>3</sup>.

If the original document containing the words complained of has been destroyed, secondary evidence of its contents is admissible, but the actual words must be proved as pleaded<sup>4</sup>.

1 *Harrison v Bevington* (1838) 8 C & P 708. As to the need to plead and prove the exact words see PARA 176 ante.

2 *Rainy v Bravo* (1872) LR 4 PC 287.

3 *Rainy v Bravo* (1872) LR 4 PC 287. As to the functions of the judge and jury see PARA 238 et seq post.

4 *Rainy v Bravo* (1872) LR 4 PC 287; cf *Collins v Jones* [1955] 1 QB 564, [1955] 2 All ER 145, CA; *Harris v Warre* (1879) 4 CPD 125. As to the indorsement of claim in libel actions see RSC Ord 82 r 2; and PARAS 169, 197 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/230. Public interest immunity.

#### 230. Public interest immunity.

If the words complained of form part of a document enjoying public interest immunity<sup>1</sup>, the plaintiff will be unable to obtain production of the document, despite its defamatory nature<sup>2</sup>.

1 If a document the production of which is contrary to the public interest: see *Rogers v Home Secretary, Gaming Board for Great Britain v Rogers* [1973] AC 388 at 400, [1972] 2 All ER 1057 at 1060, HL, per Lord Reid.

2 *Rogers v Home Secretary, Gaming Board for Great Britain v Rogers* [1973] AC 388, [1972] 2 All ER 1057, HL.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/231. Copies of entries from register of newspapers as evidence.

#### 231. Copies of entries from register of newspapers as evidence.

In July each year printers and publishers must make to the registry office<sup>1</sup> returns of the title of a newspaper<sup>2</sup> and the names, places of business and residences<sup>3</sup> and occupations<sup>4</sup> of its proprietors<sup>5</sup>. The registrar must enter the returns in the register of newspaper proprietors, which is open to inspection by the public<sup>6</sup>. A certified or sealed copy of an entry in or extract from this register<sup>7</sup> is conclusive evidence of its contents in criminal or civil proceedings without proof of the signature or seal on it, and is prima facie evidence of all matters and things thereby appearing<sup>8</sup>.

1 'Registry office' means the principal office for the time being of the registrar in England or such other office as the Board of Trade may from time to time appoint, and 'registrar' means in England the registrar for the time being of joint stock companies, or such person as the Secretary of State for Trade and Industry (formerly the Board of Trade: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 505; TRADE AND INDUSTRY vol 97 (2010) PARA 802) may for the time being authorise in that behalf: Newspaper Libel and Registration Act 1881 s 1. The registrar for the time being of joint stock companies is the registrar of companies, as to whom see COMPANIES vol 14 (2009) PARA 131.

2 Ibid s 9(a). For the meaning of 'newspaper' see PARA 293 note 1 post.

3 'Place of residence' includes the street, square or place where the person to whom it refers resides, and the number, if any, or other designation of the house in which he resides: ibid s 1.

4 When applied to any person, 'occupation' means his trade or following and, if none, then his rank or usual title, such as esquire or gentleman: ibid s 1.

5 Ibid s 9(b). For the meaning of 'proprietor' see PARA 294 note 5 post. For the form of return see s 9, Sch A.

6 See ibid s 13. As to the penalty for omission to make returns see s 10; as to transfer of shares and interests in newspapers see s 11, Sch B; and as to the penalty for wilful misrepresentation in or omission from returns see s 12. Fees are payable for the registrar's services: see s 14. See further PRESS, PRINTING AND PUBLISHING. These provisions do not apply to newspapers belonging to a joint stock company incorporated under what is now the Companies Act 1985: see the Newspaper Libel and Registration Act 1881 s 18.

7 As to discovery of the names of the printer, publisher or proprietor of a newspaper see PARA 212 ante.

8 See the Newspaper Libel and Registration Act 1881 s 15.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **231 Copies of entries from register of newspapers as evidence**

TEXT AND NOTES 1-5--Reference 'to the Registry Office' is now 'to the registrar': Newspaper Libel and Registration Act 1881 s 9 (amended by SI 2009/1941).

NOTE 1--Definition of 'registry office' omitted: SI 2009/1941. Definition of 'registrar' substituted: SI 2009/1941.

NOTE 6--Newspaper Libel and Registration Act 1881 s 13 substituted, ss 11, 18 amended, s 14 omitted: SI 2009/1941.

TEXT AND NOTES 7, 8--Newspaper Libel and Registration Act 1881 s 15 substituted: SI 2009/1941.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/232. Evidence in rebuttal of defence.

### **232. Evidence in rebuttal of defence.**

On the trial of an action in which the onus of proof of the main defence is on the defendant, as under a plea of justification<sup>1</sup>, it is competent for the plaintiff to adduce in the first instance evidence only of such bare facts as it is necessary for him to prove, and, if the defendant's evidence makes out a prima facie case in support of justification, the plaintiff may then adduce evidence in reply with a view to rebutting the defendant's case<sup>2</sup>. This is subject to the court's overriding discretion to give directions as to the course taken at the trial<sup>3</sup>. The plaintiff ought to make known to the judge, at the opening of his case, the course he proposes to follow and invite the judge's consent to it. However, if the plaintiff elects to adduce evidence in the first instance in order to meet by anticipation the plea of justification, as is the usual practice, he should so adduce all his evidence, for after he has closed his case he will not normally be permitted to lead additional evidence in reply to the defence of justification<sup>4</sup>.

<sup>1</sup> As to the defence of justification see PARA 82 et seq ante. As to pleading justification see PARAS 189-190 ante.

<sup>2</sup> *Browne v Murray* (1825) Ry & M 254 per Abbott CJ; cf *Rees v Smith* (1816) 2 Stark 31; and *Duncombe v Daniell* (1837) 8 C & P 222.

<sup>3</sup> *Beevis v Dawson* [1957] 1 QB 195, [1956] 3 All ER 837, CA; *Maclaren & Sons v Davis* (1890) 6 TLR 372 at 373, DC, per Cave J; citing *Wright v Willcox* (1850) 9 CB 650. The court has an overriding discretion to allow evidence to be given in reply.

<sup>4</sup> *Browne v Murray* (1825) Ry & M 254 per Abbott CJ; cf *Rees v Smith* (1816) 2 Stark 31; *Duncombe v Daniell* (1837) 8 C & P 222. See also note 3 supra.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/233. Malice.

### **233. Malice.**

Where the defendant has pleaded fair comment<sup>1</sup> or qualified privilege<sup>2</sup>, to which the plaintiff has pleaded malice<sup>3</sup> in a reply, it is for the plaintiff to adduce evidence of the facts and matters from which malice is to be inferred. Such facts and matters must have been pleaded<sup>4</sup>.

1 As to the defence of fair comment see PARA 135 et seq ante. As to pleading fair comment see PARA 191 ante.

2 As to the defence of qualified privilege see PARA 109 et seq ante. As to pleading privilege see PARA 193 ante.

3 As to malice see PARA 149 et seq ante. As to pleading malice see PARA 195 ante.

#### **UPDATE**

#### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/234. Damages.

### **234. Damages.**

In a libel action, damage is presumed<sup>1</sup>, but the plaintiff may give evidence of any actual injury to his reputation or any actual loss suffered. If an individual<sup>2</sup>, he may also give evidence as to his hurt feelings and any embarrassment or distress suffered by reason of the publication of the words complained of<sup>3</sup>.

1 As to damages see PARA 248 et seq post. As to mitigation see PARA 237 post.

2 Ie not a corporate body, as to which see PARA 25 ante.

3 See *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86 at 104, [1964] 3 All ER 947 at 957, CA, per Pearson LJ, and at 107 and 959 per Diplock LJ. See also PARA 18 ante. Events including unjustified suspicion, rumour or complaints alone subsequent to publication of words complained of in an action for libel are irrelevant to the issue of distress flowing from the loss of reputation resulting from the publication of the alleged libel: *Bennett v Guardian Newspapers Ltd* [1997] TLR 104, CA.

#### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/A. PLAINTIFF'S CASE/235. Cross-examination as to credit.

### **235. Cross-examination as to credit.**

If the plaintiff, in evidence in chief, gives evidence of any fact which the defendant disputes, cross-examination as to specific incidents not mentioned in the libel, or in the particulars furnished for mitigation of damages<sup>1</sup>, to suggest that the plaintiff is a person of bad reputation is admissible as cross-examination as to credit, but not to mitigate damages, and great care should be taken by the judge to see that the jury appreciates the distinction<sup>2</sup>. If the incidents put to the plaintiff are denied by him, no further evidence may be called by the defence to rebut<sup>3</sup> his denials<sup>4</sup>.

1     le under RSC Ord 18 r 12(1)(c). As to pleading mitigation see PARA 194 ante.

2     *Hobbs v CT Tinling & Co Ltd, Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA.

3     For comparison as to evidence in rebuttal of justification see PARA 232 ante.

4     *Hobbs v CT Tinling & Co Ltd, Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA. The jury is entitled to disbelieve the plaintiff's denials, but the rejection of his denials does not prove the facts which he denies. It only destroys his credibility in respect of other evidence: *Hobbs v CT Tinling & Co Ltd, Hobbs v Nottingham Journal Ltd* supra.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/B. DEFENDANT'S CASE/236. Conclusiveness of plaintiff's convictions for purposes of defamation actions.

## ***B. DEFENDANT'S CASE***

### **236. Conclusiveness of plaintiff's convictions for purposes of defamation actions.**

In an action for libel or slander in which the question whether the plaintiff, or one of several plaintiffs, did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, the plaintiff stands convicted of that offence<sup>1</sup> is conclusive evidence that he committed that offence, and his conviction for that offence is admissible in evidence accordingly<sup>2</sup>. In any such action in which a plaintiff is thus proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction and the contents of the information, complaint, indictment or

charge-sheet on which that person was convicted, without prejudice to the admission of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, is admissible in evidence for the purpose of identifying those facts<sup>3</sup>.

In the case of an action for libel or slander in which there is more than one plaintiff, proof that any of the plaintiffs stands convicted of an offence is conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other plaintiff<sup>4</sup>.

1 For these purposes, a person is taken to stand convicted of an offence if, but only if, there subsists against him a conviction of that offence by or before a court in the United Kingdom or a court-martial there or elsewhere: Civil Evidence Act 1968 s 13(3). For the meaning of 'United Kingdom' see PARA 76 note 3 ante.

2 See *ibid* s 13(1), (2A)(a) (respectively amended and added by the Defamation Act 1996 s 12(1)); and CIVIL PROCEDURE vol 12 (2009) PARA 1209. The effect of this amendment is that, where the criminal guilt of some person other than the plaintiff is in issue in a libel or slander action, a rebuttable presumption of guilt under the Civil Evidence Act 1968 s 11 (as amended) applies, but no longer a conclusive presumption under s 13 (as originally enacted). The amendment so made applies only where the trial of the action begins after 4 September 1996: see the Defamation Act 1996 ss 12(1), 19(2). For similar amendments in relation to Northern Ireland see s 12(3). As to rehabilitated offenders see PARAS 11, 92, 101 ante.

3 See the Civil Evidence Act 1968 s 13(2) (amended by the Defamation Act 1996 s 12(1)); and CIVIL PROCEDURE vol 12 (2009) PARA 1209.

4 Civil Evidence Act 1968 s 13(2A)(b) (as added: see note 2 *supra*).

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 236 Conclusiveness of plaintiff's convictions for purposes of defamation actions

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(i) Evidence/B. DEFENDANT'S CASE/237. Mitigation of damages.

### 237. Mitigation of damages.

In mitigation of damages, the defendant may adduce evidence of the plaintiff's bad reputation, but not evidence of specific instances of misconduct nor evidence of rumours and suspicions to the same effect as the defamatory matter complained of<sup>1</sup>. Evidence as to the plaintiff's reputation is usually given by those who know him, and must relate to the relevant sector of his life or character; in chief the witness may not give evidence of particular instances, but in cross-examination he may be asked the grounds of his belief and on what it is based<sup>2</sup>. Particulars of the facts and matters to be relied on in mitigation of damages must be pleaded<sup>3</sup>; the defendant can also rely on his particulars of justification or fair comment for this purpose<sup>4</sup>. Where a defendant has not justified in his defence, he may not at the trial seek to justify under a plea of mitigation, either by adducing evidence in chief<sup>5</sup>, or by cross-examination<sup>6</sup>. However, he may cross-examine as to credit, even on matters which if adduced in mitigation would fall within these provisions, without furnishing particulars beforehand<sup>7</sup>.

1 As to evidence as to the plaintiff's reputation see *Scott v Sampson* (1882) 8 QBD 491; *Mangena v Wright* [1909] 2 KB 958 (not following *Scaife v Kemp & Co* [1892] 2 QB 319); *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL; *Bennett v Guardian Newspapers Ltd* (1997) Times, 27 February, CA. See also PARA 260 post, and the cases there cited.

2 *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL. See especially the judgment of Lord Denning at 1137 et seq and at 888 et seq.

3 RSC Ord 18 r 12(1)(c). As to pleading mitigation see PARA 194 ante.

4 See *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL.

5 *Abbot v Chapman* (1673) 2 Lev 81; *Dennis v Pawling* (1716) 12 Vin Abr 159, p 16; *Watson v Christie* (1800) 2 Bos & P 224; *Speck v Phillips* (1839) 5 M & W 279; *Watt v Watt* [1905] AC 115 at 118, HL, per Lord Halsbury LC; *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA. As to giving in evidence facts short of justification see *East v Chapman* (1827) Mood & M 46; *Charlton v Watton* (1834) 6 C & P 385; *Lake v King* (1670) 1 Wms Saund (1845 Edn) 131 at 132 notes.

6 *Watt v Watt* [1905] AC 115, HL; *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA.

7 *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA. As to the effect of such cross-examination see PARA 235 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 237 Mitigation of damages

NOTE 1--See *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540, [2006] 4 All ER 613.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/238. Judge's duty as to questions to be left to the jury.

## (ii) Functions of Judge and Jury

### 238. Judge's duty as to questions to be left to the jury.

The question whether the words complained of are defamatory of the plaintiff is a question of fact for the jury, but, before the question is submitted to the jury, it is for the judge to rule upon the evidence whether the words complained of are reasonably capable of referring to the plaintiff<sup>1</sup>. Unless the question has already been determined at a preliminary hearing, he should also rule on whether the words are reasonably capable of bearing a defamatory meaning in the minds of reasonable persons in the circumstances of the particular case<sup>2</sup>. It is not enough that some person or another might possibly understand the words complained of as referring to the plaintiff or as making an imputation upon him<sup>3</sup>. It is unreasonable if, where there are a number of good interpretations, the only bad one should be seized upon<sup>4</sup>. The true test according to the authorities is whether, in the circumstances in which the statement was published, reasonable persons to whom the publication was made would understand it of the plaintiff and in a

defamatory sense<sup>5</sup>. Ordinary men and women have different temperaments and outlooks; some are unusually suspicious and some are unusually naive; one must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question<sup>6</sup>. If the plaintiff alleges more than one defamatory meaning of the words complained of, the judge must rule whether the words are capable of bearing each of those meanings<sup>7</sup>.

In construing the words complained of, so as to see whether the plaintiff has made out a case to be left to the jury where nothing is alleged to give the words an extended meaning, the judge must consider the statement as a whole, interpret the words in their natural and ordinary meaning, and ask himself whether a reasonable jury could reasonably come to the conclusion that the words were defamatory of the plaintiff<sup>8</sup>. If the words are reasonably capable of being understood in a defamatory sense, he must leave it to the jury to say whether they did, in fact, defame the plaintiff. If not, he must give judgment for the defendant without leaving the case to the jury<sup>9</sup>.

1 See PARA 40 ante.

2 See PARA 48 ante. As to preliminary rulings on meaning see RSC Ord 82 r 3A; and PARA 224 ante. As to whether words are capable of bearing a defamatory meaning see *Knupffer v London Express Newspapers Ltd* [1944] AC 116, [1944] 1 All ER 495, HL; *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741, HL; *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 72, HL, per Lord Halsbury C; *Linotype Co Ltd v British Empire Type-setting Machine Co Ltd* (1899) 81 LT 331, HL; *E Hulton & Co v Jones* [1910] AC 20, HL; *Browne v Thomson & Co* 1912 SC 359; *Stubbs Ltd v Russell* [1913] AC 386 at 393, HL; *Broome v Agar* (1928) 138 LT 698 at 699, CA; *Lord Hamilton v Glasgow Dairy Co* 1931 SC (HL) 67; *Thaarup v Hulton Press Ltd* (1943) 169 LT 309, CA; *Beevis v Dawson* [1957] 1 QB 195, [1956] 3 All ER 837, CA; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL.

3 *Knupffer v London Express Newspaper Ltd* [1944] AC 116, [1944] 1 All ER 495, HL; *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 73, 76, HL; *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741, HL.

4 *Capital and Counties Bank v Henty & Sons* (1880) 5 CPD 514 at 541, CA, per Brett LJ; affd (1882) 7 App Cas 741, HL; approved in *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 73, HL, per Lord Halsbury LC.

5 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 745, HL, per Lord Selborne C. Cf *Sim v Stretch* [1936] 2 All ER 1237, HL; *E Hulton & Co v Jones* [1910] AC 20, HL (where it was held that unintentional defamation was no defence at common law); *Jones v Skelton* [1963] 3 All ER 952, [1963] 1 WLR 1362, PC.

6 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 259, [1963] 2 All ER 151 at 155, HL, per Lord Reid; and see PARA 46 ante.

7 *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, [1963] 2 All ER 151, HL.

8 *Morris v Sandess Universal Products* [1954] 1 All ER 47, [1954] 1 WLR 67, CA.

9 See the cases cited in notes 2-5 supra.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/239. Judge's duty where there is a true or legal innuendo.

### **239. Judge's duty where there is a true or legal innuendo.**

Where there is a true or legal innuendo<sup>1</sup>, the judge must consider not merely the statement complained of, viewed as a whole<sup>2</sup>, and its context, but also the manner and occasion of its publication, the persons to whom it was published and all other facts which are properly in evidence as affecting the meaning of the statement in the circumstances of the particular case<sup>3</sup>. If the judge, having thus interpreted the words complained of, is satisfied that the words are capable of the meaning ascribed to them by the innuendo, he must leave to the jury the question whether the words in fact conveyed that meaning. If the judge does not consider that the words are capable of bearing the innuendo meaning, it is his duty not to leave the question raised by the innuendo to the jury<sup>4</sup>. If the statement of claim ascribes more than one meaning to the words, the judge must rule in respect of each such meaning whether the words are capable of bearing it<sup>5</sup>.

The judge need not leave the issue of libel or no libel to the jury in the absence of evidence of facts calculated to lead reasonable people to understand the words complained of in a defamatory sense<sup>6</sup>.

In determining whether the words are capable of bearing the innuendo meaning, the judge should not take into account mere conjectures which a person to whom the matter complained of was published might possibly but unreasonably form; the words must be such that a reasonable person could construe them unfavourably in such a sense as to make some adverse imputation upon the plaintiff<sup>7</sup>.

1 For the general principles governing the use of innuendoes see PARA 47 ante.

2 *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 78, HL.

3 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 744, HL, per Lord Selborne LC, and at 771 per Lord Blackburn; *Australian Newspaper Co v Bennett* [1894] AC 284 at 288, PC, per Lord Herschell LC; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL, where the issue was the identification of the plaintiff, as to which see PARAS 40, 238 ante.

4 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741, HL; *R v Shipley* (1784) 4 Doug KB 73; *Parmiter v Coupland* (1840) 6 M & W 105; *Hart v Wall* (1877) 2 CPD 146; *Fisher v Clement* (1830) 10 B & C 472; *Mulligan v Cole* (1875) LR 10 QB 549; *Australian Newspaper Co v Bennett* [1894] AC 284, PC; *Cox v Lee* (1869) LR 4 Exch 284; *O'Donoghue v Hussey* (1871) IR 5 CL 124, Ex Ch; *O'Brien v Marquis of Salisbury* (1889) 54 JP 215, DC; *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd, Talbot v Associated Newspapers Ltd* [1933] 2 KB 616, CA. See also *Simmons v Mitchell* (1880) 6 App Cas 156, PC; *Churchill v Gedney* (1889) 53 JP 471 (as to where words have two meanings).

5 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, [1963] 2 All ER 151, HL.

6 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 743, HL.

7 *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 73, 76, HL, per Lord Halsbury LC. In this case no innuendo was pleaded. See also *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 744, HL, per Lord Selborne LC.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/240. Judge's duty where there is a case to go to the jury.

#### **240. Judge's duty where there is a case to go to the jury.**

The proper course for the judge to adopt in civil proceedings for libel or slander, or criminal libel proceedings, where there is a case to go to the jury, is to define what is a libel in point of law, and leave it to the jury to decide as a matter of fact whether the particular publication falls within that definition or not<sup>1</sup>. The judge may as a matter of advice express his own opinion as to the nature of the particular publication<sup>2</sup>, but he is not bound to do so as a matter of law<sup>3</sup>, and it would be wrong for the judge to direct the jury positively that it must find that a particular publication is a libel or a slander<sup>4</sup>.

The jury's verdict on the question of libel or no libel can be assailed on the ground that it is perverse<sup>5</sup>, but it is only in the most extreme cases that it should be set aside<sup>6</sup>.

1 *Parmiter v Coupland* (1840) 6 M & W 105 at 108-109.

2 *Parmiter v Coupland* (1840) 6 M & W 105 at 108; *Darby v Ouseley* (1856) 1 H & N 1 at 13; *Dakhyl v Labouchere* [1908] 2 KB 325n, HL, where the judge's expression of opinion as to the meaning of 'quack' was held to be a misdirection. See also the Libel Act 1792 ss 1, 2 (see PARA 301 post), which, although directed to criminal proceedings, is declaratory of the common law.

3 *Parmiter v Coupland* (1840) 6 M & W 105; *Baylis v Lawrence* (1840) 11 Ad & El 920, where it was also said that the rule is the same in criminal proceedings for libel. See further *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 775, HL, per Lord Blackburn.

4 *Parmiter v Coupland* (1840) 6 M & W 105 at 108-109 per Alderson B.

5 *Lockhart v Harrison* (1928) 139 LT 521, HL.

6 See PARA 246 text and note 4 post.

### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/241. Judge's duty where defence is fair comment.

#### **241. Judge's duty where defence is fair comment.**

Where the defence of fair comment is pleaded<sup>1</sup>, the question whether or not the subject matter of the comment is capable of being a matter of public interest is one of law for the judge<sup>2</sup>. If the

judge decides against the defendant on this point, the defence fails. It seems, however, that the question whether the subject matter was indeed one of public interest is a question for the jury<sup>3</sup>.

The question whether all or some of the words complained of are capable of being statements of fact or comments is a question of construction for the judge. If, in his opinion, there is no reasonable doubt, he must direct the jury accordingly; but if, in his view, there is reasonable doubt as to whether the words are statements of fact or expressions of opinion he must leave it to the jury to decide<sup>4</sup>.

Although the question whether or not comment is fair is always one for the jury<sup>5</sup>, it is not for the jury to agree or disagree with the comment<sup>6</sup> or to substitute its own opinion as to the merits of a work criticised for that of the critic; but if a critic imputes to the person whose works or acts he criticises motives not warranted by the facts, or reflects upon the plaintiff as a person, he cannot successfully plead fair comment if the jury finds that the imputations were not warranted by the facts.

Before leaving the question of fair comment to the jury, the judge must be satisfied that the defamatory inference can reasonably be drawn from the stated facts; if it can, it is for the jury to say whether the comment was fair<sup>7</sup>.

1 As to the defence of fair comment see PARA 135 et seq ante. As to pleading fair comment see PARA 191 ante.

2 It is submitted that his duty must be limited to ruling on whether the matter is capable of being in the public interest for the reasons set out in note 3 infra.

3 It was held, without argument, in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 141, 143, CA, per Lopes LJ that it was for the judge to rule on public interest. But, in relation to qualified privilege and what is now the Defamation Act 1996 s 15(3) (not in force at the date at which this volume states the law) (see PARA 131 ante), it was held in *Kingshott v Associated Kent Newspapers Ltd* [1991] 1 QB 88, [1991] 2 All ER 99, CA, that public concern and benefit were questions for the jury. It is submitted that the same reasoning and conclusions apply equally to the same issue in fair comment.

4 *Sutherland v Stopes* [1925] AC 47 at 87, HL; *Aga Khan v Times Publishing Co* [1924] 1 KB 675 at 680-681, CA; *Jones v Skelton* [1963] 3 All ER 952, [1963] 1 WLR 1362, PC. See PARA 138 text and notes 2-3 ante.

5 *Jenner v A'Beckett* (1871) LR 7 QB 11; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 143, CA; *Cooney v Edeveain* (1897) 14 TLR 34, CA.

6 *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100 at 109, CA.

7 *Homing Pigeon Publishing Co Ltd v Racing Pigeon Publishing Co Ltd* (1913) 29 TLR 389; *Jones v Skelton* [1963] 3 All ER 952, [1963] 1 WLR 1362, PC. See PARA 145 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 241 Judge's duty where defence is fair comment

NOTE 3--1996 Act s 15(3) in force on 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/242. Judge's duty where defence is privilege.

#### **242. Judge's duty where defence is privilege.**

The question whether the occasion is privileged<sup>1</sup>, if the facts are not in dispute, is a question of law for the judge. If there are disputed questions of fact upon which the existence of privilege may depend, the determination of those facts is for the jury and it will be for the judge to say, on the facts so found, whether the occasion is one of privilege<sup>2</sup>.

In relation to reports and statements for which statutory qualified privilege is claimed, the question whether the matter is of public concern, or whether the publication is for the public benefit, is for the jury; the judge's role is limited to withdrawing a case where these matters are not capable of being established<sup>3</sup>.

1 As to the defence of privilege see PARA 94 et seq ante. As to pleading privilege see PARA 193 ante.

2 See *Boston v WS Bagshaw & Sons* [1966] 2 All ER 906, [1966] 1 WLR 1126, CA. See also *Hebditch v MacIlwaine* [1894] 2 QB 54 at 58, CA, per Lord Esher MR; *Hope v l'Anson and Weatherby* (1901) 18 TLR 201 at 205, CA; *Adam v Ward* [1917] AC 309, HL; *Minter v Priest* [1930] AC 558, HL; *Watt v Longsdon* [1930] 1 KB 130 at 143, 153, CA. As to the danger of confusing publication with privilege, and the danger of confusing privileged occasion with privileged communication, see *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 529, CA, per Lopes LJ; *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 75-76, HL, per Lord Halsbury C; and *Adam v Ward* supra at 328, 334, 348. As to the functions of judge and jury see *Bromage v Prosser* (1825) 4 B & C 247, explained in *Clark v Molyneux* (1877) 3 QBD 237 at 247, CA; *Darby v Ouseley* (1856) 1 H & N 1; *Kine v Sewell* (1838) 3 M & W 297 at 301 per Parke B; *Gilpin v Fowler* (1854) 9 Exch 615; *Cooke v Wildes* (1855) 5 E & B 328; *Whiteley v Adams* (1863) 15 CBNS 392; *Jackson v Hopperton* (1864) 16 CBNS 829; *Stace v Griffith* (1869) LR 2 PC 420; *Stuart v Bell* [1891] 2 QB 341 at 345, CA; *Kimber v Press Association Ltd* [1893] 1 QB 65, CA; *Sadgrove v Hole* [1901] 2 KB 1, CA; *Collins v Cooper* (1902) 19 TLR 118, CA.

3 *Kingshott v Associated Kent Newspapers Ltd* [1991] 1 QB 88, [1991] 2 All ER 99, CA.

### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **242 Judge's duty where defence is privilege**

NOTE 2--See *Conway v Raitu* [2005] EWCA Civ 1302, [2006] 1 All ER 571.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/243. Judge's duty where malice is in issue.

#### **243. Judge's duty where malice is in issue.**

If there is evidence of malice<sup>1</sup>, whether intrinsic (in the statement itself) or extrinsic (outside the statement), to displace a defence of fair comment or qualified privilege<sup>2</sup>, the issue of malice must be determined by the jury<sup>3</sup>, but if there is no such evidence, the judge should not leave the question to the jury<sup>4</sup>, but should enter judgment for the defendant<sup>5</sup>. In directing a jury as to

malice, the judge need not put each piece of evidence of malice to the jury, telling it that it may act on it even if there is very strong evidence to negative it; the judge is entitled to leave to the jury the question of malice at large<sup>6</sup>.

In order to entitle the plaintiff to have the question of express malice left to the jury, it is not necessary for him to show circumstances necessarily leading to the conclusion that actual malice existed, or such as are inconsistent with its non-existence, but it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence<sup>7</sup>. It has been said that it is usually safer to leave the question to the jury, but that this is subject to the rule that the case should not be left to the jury where the facts stated by the plaintiff are equally compatible with the absence and existence of malice<sup>8</sup>. If the defendant submits at the end of the plaintiff's case that there is no evidence of malice, the judge has a discretion whether he will rule on the matter then or whether he will defer ruling until the whole of the evidence has been given. If the defendant has to meet other issues besides the issue of libel, that is one of the matters to be taken into consideration by the judge in deciding at what stage he will rule on the question of malice<sup>9</sup>.

1 As to malice see PARA 149 et seq ante.

2 As to fair comment see PARA 135 et seq ante, and as to qualified privilege see PARA 109 et seq ante.

3 See *Wright v Woodgate* (1835) 2 Cr M & R 573 at 578; *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 171, CA, per Lopes CJ (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); cf *Kemsley v Foot* [1952] AC 345, [1952] 1 All ER 501, HL.

4 *Adam v Ward* [1917] AC 309 at 318, HL, per Lord Finlay C, and at 329 per Lord Dunedin; *Cooke v Wildes* (1855) 5 E & B 328 at 341 per Lord Campbell CJ; *Spill v Maule* (1869) LR 4 Exch 232 at 237; *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495 at 508; *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at 171, CA (affd sub nom *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, HL); *Sadgrove v Hole* [1901] 2 KB 1, CA; *Edmondson v Birch & Co Ltd and Horner* [1907] 1 KB 371 at 381, CA; *Minter v Priest* [1930] AC 558, HL.

5 *Stuart v Bell* [1891] 2 QB 341, CA; *Turner v Bowley & Son* (1896) 12 TLR 402, CA.

6 *Boston v WS Bagshaw & Sons* [1966] 2 All ER 906, [1966] 1 WLR 1126, CA, explaining *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL.

7 *Somerville v Hawkins* (1851) 10 CB 583; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL; but see *Boston v WS Bagshaw & Sons* [1966] 2 All ER 906, [1966] 1 WLR 1126, CA.

8 See *Spill v Maule* (1869) LR 4 Exch 232 at 237 per Cockburn CJ.

9 *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269, CA, but see *Parry v Aluminium Corpn Ltd* (1940) 162 LT 236, CA; *Cleghorn v Sadler* [1945] KB 325, [1945] 1 All ER 544; *Young v Rank* [1950] 2 KB 510, [1950] 2 All ER 166; *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, HL (as to the possible disadvantages in certain cases of taking the jury's verdict before ruling whether there is evidence of malice).

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 243 Judge's duty where malice is in issue

NOTE 4--See *Alexander v Arts Council of Wales* [2001] EWCA Civ 514, [2001] EMLR 27.

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#### **244. Failure to direct the jury.**

A new trial will not be granted on account of the judge's failure to direct the jury in a particular manner, if, at the trial, the appellant did not invite the judge so to direct the jury<sup>1</sup>.

<sup>1</sup> *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 76, HL; *Child v Affleck* (1829) 9 B & C 403; *Somerville v Hawkins* (1851) 10 CB 583; *Taylor v Hawkins* (1851) 16 QB 308; *Gardner v Slade* (1849) 13 QB 796; *Rogers v Clifton* (1803) 3 Bos & P 587; *Fountain v Boodle* (1842) 3 QB 5. See also *Clark v Molyneux* (1877) 3 QBD 237, CA (misdirection found); *Braddock v Bevins* [1948] 1 KB 580, [1948] 1 All ER 450, CA (framing questions to jury); *Gilpin v Fowler* (1854) 9 Exch 615 (interpretation of libel by jury); and see generally *Toogood v Spyring* (1834) 1 Cr M & R 181; *Wright v Woodgate* (1835) 2 Cr M & R 573. As to relying on appeal on a criticism of the summing up not raised at the trial see *Kiam v Neill* [1996] TLR 461, CA. As to a new trial on the question of damages see PARA 267 et seq post.

### **UPDATE**

#### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/245. Jury's function as to damages.

#### **245. Jury's function as to damages.**

The assessment of damages<sup>1</sup> is peculiarly the province of the jury<sup>2</sup>, and the judge, unless sitting alone, must not decide the amount himself. He should direct the jury as to the relevant factors, such as the extent of publication, the degree to which the words would be believed or the range of persons having the special knowledge needed to perceive an innuendo meaning<sup>3</sup>, the position and standing of the plaintiff and his conduct<sup>4</sup>, the conduct of the defendant<sup>5</sup> and all the circumstances of the case. The judge may, in directing the jury on quantum, draw their attention to previous libel awards made or approved by the Court of Appeal, and also to the conventional compensation scale in personal injury cases, and judge or counsel may indicate to the jury the level of compensation they consider appropriate<sup>6</sup>. The Court of Appeal has, however, expressed concern in relation to this otherwise unfettered discretion of the jury to assess damages and held that large awards should be more closely scrutinised by the Court of Appeal.<sup>7</sup>

Where a plaintiff brings an action to recover damages for a libel and also for a slander there are two distinct causes of action, and the jury must find a separate verdict on each issue. A verdict of one sum to cover both causes of action is no verdict, and judgment may not be entered for either party<sup>8</sup>.

<sup>1</sup> As to damages see PARA 248 et seq post. See also PARAS 18-19 ante.

2 *Bray v Ford* [1896] AC 44 at 52, HL; *Jones v E Hulton & Co* [1909] 2 KB 444 at 457, 483, CA, per Farwell LJ; affd [1910] AC 20, HL. See also *Gregory v Williams* (1844) 1 Car & Kir 568; *Haythorn v Lawson* (1827) 3 C & P 196 (actions by partners); *Day v Robinson* (1835) 4 Nev & MKB 884, Ex Ch; *Pemberton v Colls* (1847) 10 QB 461 (entire damages on several counts of slander); cf *Griffiths v Lewis* (1846) 8 QB 841.

3 *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL.

4 See PARA 262 post.

5 See PARA 251 et seq post.

6 See *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, [1990] 1 All ER 269, CA; *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA; and *John v MGN Ltd* [1996] 2 All ER 35, [1996] 3 WLR 593, CA.

7 *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA. Note this tightening of control is also consistent with and reflects more recent developments in Court of Appeal guidance on damages to juries in the area of civil actions against the police: see *Thompson v Metropolitan Police Comr*, *Hsu v Metropolitan Police Comr* [1997] 2 All ER 762, CA.

8 *Weber v Birkett* [1925] 2 KB 152, CA; distinguished in *Barber v Pigden* [1937] 1 KB 664, [1937] 1 All ER 115, CA, where, in the absence of objection to one verdict for separate slanders, the point could not be raised on appeal. Cf *Mechanical and General Inventions Co Ltd and Lehwess v Austin and Austin Motor Co Ltd* [1935] AC 346, HL; *Bocock v Enfield Rolling Mills Ltd* [1954] 3 All ER 94, [1954] 1 WLR 1303, CA; see also note 2 supra.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(ii) Functions of Judge and Jury/246. The jury's verdict.

#### 246. The jury's verdict.

A jury has an absolute right to give a general verdict, that is, to say simply whether it finds for the plaintiff or the defendant<sup>1</sup>. It cannot be required to give a special verdict or to answer specific questions and, if it does return a general verdict, it cannot be asked to furnish the grounds on which it was reached<sup>2</sup>. If the jury returns a special verdict or answers questions put to it by the judge, those answers are binding; once the jury has been discharged, no evidence may be received as to the grounds on which the verdict was reached or the effect it was intended to have nor will a new trial be ordered for such reasons<sup>3</sup>. A verdict may be set aside on the ground that it is perverse, but a verdict is only perverse if it is such that no reasonable jury could properly find it upon the evidence given, and it is only in the most extreme cases that this course will be adopted<sup>4</sup>.

1 See *Barnes v Hill* [1967] 1 QB 579, [1967] 1 All ER 347, CA, and JURIES vol 61 (2010) PARA 847 et seq.

2 *Barnes v Hill* [1967] 1 QB 579, [1967] 1 All ER 347, CA.

3 See *Boston v WS Bagshaw & Sons* [1967] 2 All ER 87n, [1966] 1 WLR 1135n, CA, where a jury made an express finding that there was no malice; the court refused to consider affidavits from all 12 jurors that they had meant to find malice. As to a new trial on the question of damages see PARA 267 et seq post.

4 *Broome v Agar* (1928) 138 LT 698, CA; *Lockhart v Harrison* (1928) 139 LT 521, HL; *Rubber Improvement Ltd v Daily Telegraph Ltd*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, [1963] 2 All ER 151, HL.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 246 The jury's verdict

NOTE 4--Where a party who would benefit from the only rational verdict open to a jury, expressly invites the judge nevertheless to leave the question to the jury, that party is debarred from contending that the jury's answer is perverse: *McPhilemy v Times Newspapers Ltd (No 3)* [2001] EWCA Civ 871, [2001] EMLR 832, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(6) TRIAL/(iii) Costs/247. Costs in defamation actions.

### (iii) Costs

#### 247. Costs in defamation actions.

Where, in a defamation action, defences of justification and privilege are set up and the defendant fails as to the defence of justification, and judgment is given for him on the defence of privilege, the plaintiff is not entitled to the costs<sup>1</sup> of witnesses whose evidence does not relate exclusively to the plea of justification<sup>2</sup>.

If one of two defendants admits the libel and pleads an apology, while the other justifies, and there is a verdict for a sum of damages against both and judgment is entered accordingly with costs, the defendant who pleads justification is alone liable for the costs occasioned to the plaintiff by that defence<sup>3</sup>.

If the defendant amends by deleting or limiting the scope of his defence of justification, the plaintiff may be entitled to his costs thrown away by that amendment in any event<sup>4</sup>.

1 As to costs generally see RSC Ord 62; and CIVIL PROCEDURE. As to the effect on costs of a payment into court see PARA 201 ante.

2 *Brown v Houston* [1901] 2 KB 855, CA, where *Harrison v Bush* (1856) 5 E & B 344 was considered.

3 *Hobson v WC Leng & Co* [1914] 3 KB 1245, CA.

4 However see *Goody v Odhams Press Ltd* [1967] 1 QB 333, [1966] 3 All ER 369, CA (costs thrown away reserved in special circumstances).

## UPDATE

### 168-273 Pleading, Practice and Relief



RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(i) Damages generally/248. Basis of the award of damages.

## **(7) DAMAGES**

### **(i) Damages generally**

#### **248. Basis of the award of damages.**

In actions for libel and slander, damages are awarded to compensate the plaintiff for (1) the injury to his reputation; and (2) the hurt to his feelings. Such damages are compensatory and are at large<sup>1</sup>. They operate to vindicate the plaintiff to the public and to console him for the wrong done; they are better viewed as a solatium than as monetary recompense for harm measurable in money terms<sup>2</sup>. Special damages, over and above such general damages, may be awarded in respect of actual material loss proved to have been sustained as a natural result of the words complained of<sup>3</sup>. Damages have never been awarded for injury to health consequent upon defamation, but the possibility cannot be excluded<sup>4</sup>. The general compensatory damages may be increased to take into account the defendant's motives in uttering the words complained of, or his conduct before or during the action; such 'aggravated damages' (which must be distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury, going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors<sup>5</sup>. Exemplary damages, that is, damages going beyond mere compensation, can only be awarded in special circumstances<sup>6</sup>.

Juries may now be referred by way of comparison to the compensation scales in personal injury cases as well as to previous libel awards made or approved by the Court of Appeal<sup>7</sup>.

1 As to the matters to be considered under the phrase 'at large' see *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1072, [1972] 1 All ER 801 at 825, HL, per Lord Hailsham of St Marylebone LC. As to the position of a limited company see PARA 25 ante.

2 See *Uren v John Fairfax & Sons Pty Ltd* (1965-66) 117 CLR 118 at 150 per Windeyer J, quoted with approval in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1072, [1972] 1 All ER 801 at 825, HL, per Lord Hailsham of St Marylebone LC.

3 As to special damages see PARAS 257-259 post.

4 See *Wheeler v Somerfield* [1966] 2 QB 94, [1966] 2 All ER 305, CA, per Lord Denning MR. For a case of injury to health as a result of the publication to the plaintiff of false words published maliciously see *Janvier v Sweeney* [1919] 2 KB 316, CA; and for a case where a false statement uttered as a misplaced practical joke caused illness by nervous shock and damages were recovered see *Wilkinson v Downton* [1897] 2 QB 57.

5 See *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 167, HL, especially per Lord Devlin. See further *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86, [1964] 3 All ER 947, CA.

6 See PARA 256 post.

7 *John v MGN Ltd* [1996] 2 All ER 35, [1996] 3 WLR 593, CA. As to the previous rule whereby personal injury awards could not be cited by judge or counsel see *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA; *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, [1964] 3 All ER 947, CA. See also PARA 245 notes 6-7 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 248 Basis of the award of damages

TEXT AND NOTES--For a general discussion of the factors to be taken into consideration in the assessment of damages, see *Jones v Pollard* [1997] EMLR 233, CA. See *Gur v Avrupa Newspaper Ltd* [2008] EWCA Civ 594, [2009] EMLR 76 (difference between personal injuries and damage to reputation were too great for detailed comparison to be made).

NOTE 2--See *The Gleaner Co Ltd v Abrahams* [2003] UKPC 55, [2003] 3 WLR 1038 (damages awarded reflected importance placed on libellous articles in Jamaican society and aimed both to compensate respondent and re-establish his reputation). The court's judgment at the substantive hearing may have some, albeit marginal, vindicatory effect: *Purnell v Business F1 Magazine Ltd* [2007] EWCA Civ 744, [2008] 1 WLR 1

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(i) Damages generally/249. Damages against joint tortfeasors.

### 249. Damages against joint tortfeasors.

At common law, in an action against joint tortfeasors for damages for the joint wrong, there can be only one judgment against the defendants<sup>1</sup>.

If exemplary damages<sup>2</sup> are to be awarded against joint tortfeasors, only one sum should be awarded; it must represent the highest common factor, that is, it must not exceed the highest sum which the least blameworthy defendant ought to pay by way of punishment<sup>3</sup>. It seems that similar principles apply to aggravated damages. Therefore, the plaintiff must sue only the most censurable defendant; or he must bring separate actions against each defendant and then consolidate them; or, in the case of a book or newspaper article, sue in the same proceedings for the publication of the manuscript to the publisher by the author<sup>4</sup>.

Judgment recovered against one person jointly liable with another is not a bar, subject to the limitation of damages recoverable, to proceedings against the other<sup>5</sup>, and a person liable in respect of the same damage as another, whether jointly or otherwise, may recover contribution from the other<sup>6</sup>.

1 As to the liability of joint tortfeasors generally see TORT vol 45(2) (Reissue) PARA 346 et seq.

2 As to exemplary damages see PARA 256 post.

3 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. See also *Maxwell v Kenn* (1928) Times, 2 and 3 February; *Chapman v Lord Ellesmere* [1932] 2 KB 431, CA; *Clark v Newsam* (1847) 1 Exch 131 at 140.

4 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham of St Marylebone LC. See, however, the criticism of this approach in *Hayward v Thompson* [1982] QB 47 at 62, [1981] 3 All ER 450 at 458-459, CA, per Lord Denning MR.

5 See the Civil Liability (Contribution) Act 1978 s 3; and TORT vol 45(2) (Reissue) PARA 348.

6 See *ibid* ss 1, 2; and TORT vol 45(2) (Reissue) PARAS 349-352.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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## (ii) Factors tending to Increase or Aggravate Damages

### 250. Gravity of the libel, manner of publication and extent of circulation.

In assessing compensation, regard must always be had to the gravity of the libel and the extent of the publication in terms of circulation and geographical area<sup>1</sup>. The plaintiff may therefore prove the manner of publication, with a view to increasing the damages, even if the defendant has admitted the fact of publication<sup>2</sup>. Generally, the damages will increase with the circulation of the libel, although not necessarily in direct proportion to it. Conversely, a limited publication may be extremely damaging, for instance if it is to an employer. If the defamatory meaning arises through a legal innuendo<sup>3</sup>, the jury should be directed that only publication to those having the requisite special knowledge may be taken into account<sup>4</sup>. If the defendant's publication of the words is established, it is not necessary to prove that he was directly responsible for the particular manner in which they were subsequently distributed<sup>5</sup>.

1 *John v MGN Ltd* [1996] 2 All ER 35, [1996] 3 WLR 593, CA.

2 *Vines v Serell* (1835) 7 C & P 163.

3 See PARA 47 ante.

4 *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL; and see *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, [1977] 1 WLR 651, CA.

5 *Gathercole v Miall* (1846) 15 M & W 319.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 250 Gravity of the libel, manner of publication and extent of circulation

NOTE 1--See *Baigent v British Broadcasting Corp* 2001 SLT 427, IH (defamation having considerable impact on claimants feelings and reputations).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(ii) Factors tending to Increase or Aggravate Damages/251. Defendant's actual malice.

### **251. Defendant's actual malice.**

The defendant's improper motives in publishing the words complained of, and in particular whether he was actuated by express malice, are matters which the jury may properly take into account as aggravating the damages<sup>1</sup>. The plaintiff may tender in evidence any words or acts of the defendant, whether before or after the publication, which tend to show his state of mind at the time of publication<sup>2</sup>; where the matters of which such evidence is given occurred substantially more recently than the publication, the jury should be warned that they may not be indicative of the defendant's intentions at the relevant time<sup>3</sup>. If the evidence incidentally establishes another cause of action<sup>4</sup>, the jury should be cautioned against awarding damages in respect of it<sup>5</sup>, although failure to caution will not be a ground for a new trial<sup>6</sup>. If the evidence is offered merely for the purpose of obtaining such damages, it will be properly rejected<sup>7</sup>.

1 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *McCary v Associated Newspapers Ltd* [1965] 2 QB 86, [1964] 3 All ER 947, CA; and see *Pearson v Lemaitre* (1843) 5 Man & G 700 at 719; and DAMAGES vol 12(1) (Reissue) PARA 1114. As to malice see PARA 149 et seq ante. If express malice is relied upon in aggravation of damages, it is desirable to plead it in the statement of claim: see PARA 186 ante.

2 *Rustell v Macquister* (1807) 1 Camp 49n; *Pearson v Lemaitre* (1843) 5 Man & G 700; see also *Plunkett v Cobbett* (1804) 5 Esp 136; *Geare v Britton* (1746) Bull NP 7; *Pearce v Ornsby* (1835) 1 Mood & R 455; and *Symmons v Blake* (1835) 1 Mood & R 477. See also PARAS 152 ante, 252 post.

3 *Hemming v Gasson* (1858) EB & E 346.

4 Eg by showing publication of further libels: *Defries v Davis* (1835) 7 C & P 112.

5 *Pearson v Lemaitre* (1843) 5 Man & G 700.

6 *Darby v Ouseley* (1856) 25 LJ Ex 227. As to a new trial on the issue of damages see PARA 267 et seq post.

7 *Pearson v Lemaitre* (1843) 5 Man & G 700; but see *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474 (damages flowing from original publication).

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### **252. Defendant's subsequent conduct.**

Whether or not the defendant's words or actions between the dates of publication and trial are such as to indicate malice at the time of publication<sup>1</sup>, they may also be relevant as factors aggravating damages. For example, repetition of a published libel, or failure to contradict it, may have this effect<sup>2</sup>.

1 As to the defendant's malice see PARA 251 ante. See also PARA 152 text and notes 4-5 ante.

2 *Smith v Harrison* (1856) 1 F & F 565; *Fielding v Variety Inc* [1967] 2 QB 841, [1967] 2 All ER 497, CA. As to other examples of relevant subsequent conduct see PARAS 253-255 post.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(ii) Factors tending to Increase or Aggravate Damages/253. Failure to apologise.

#### 253. Failure to apologise.

Although the defendant's failure to apologise is not of itself evidence of actual malice, since it is as consistent with a continuing belief in the truth<sup>1</sup>, it is likely to cause additional injury to the plaintiff's feelings and can properly be placed before the jury as tending to aggravate the damages<sup>2</sup>.

1 *Horrocks v Lowe* [1975] AC 135 at 154, [1974] 1 All ER 662 at 671, HL; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 at 533, [1965] 1 WLR 805 at 814, CA.

2 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071, [1972] 1 All ER 801 at 825, HL, per Lord Hailsham of St Marylebone LC; *John v MGN Ltd* [1996] 2 All ER 35 at 48, [1996] 3 WLR 593 at 607-608, CA, per Sir Thomas Bingham MR; see also *Crane v Bennett* 177 NY 106 (1904); *Fielding v Variety Inc* [1967] 2 QB 841, [1967] 2 All ER 497, CA; cf *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at 1164, [1971] 1 WLR 1239 at 1247, HL, per Lord Reid.

## UPDATE

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### 254. Justification.

The fact that the defendant has entered a plea of justification, and has abandoned it before trial<sup>1</sup>, or has supported it by evidence but has failed to prove it<sup>2</sup>, or has neither supported nor abandoned it<sup>3</sup>, may properly be taken into account as tending to increase the damages<sup>4</sup>. The same applies to any persistence in the charge by the defendant, although not amounting to a justification, for example, cross-examination of the plaintiff with a view to obtaining admissions without calling direct evidence of justification<sup>5</sup>.

1 *Warwick v Foulkes* (1844) 12 M & W 507; *Nagy v Webb* [1930] 1 WWR 357, [1930] 2 DLR 234 (Sask CA); *Caulfield v Whitworth* (1868) 18 LT 527.

2 *John v MGN Ltd* [1996] 2 All ER 35 at 48, [1996] 3 WLR 593 at 608, CA, per Sir Thomas Bingham MR; *Warwick v Foulkes* (1844) 12 M & W 507; *Darby v Ouseley* (1856) 25 LJ Ex 227 at 230.

3 *Simpson v Robinson* (1848) 12 QB 511; *Wilson v Robinson* (1845) 7 QB 68; and see *Caulfield v Whitworth* (1868) 18 LT 527; *Nagy v Webb* [1930] 1 WWR 357, [1930] 2 DLR 234 (Sask CA).

4 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071-1072, [1972] 1 All ER 801 at 824, HL, per Lord Hailsham of St Marylebone LC; *Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450 at 455, [1970] 2 All ER 754 at 757, CA, per Lord Denning MR.

5 *Hay v Star* (1912) Times, 1 May; and see PARA 255 post.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 254 Justification

TEXT AND NOTE 4--It is going too far to say that by merely pleading justification damages are aggravated: *Sarwar v News Group Newspapers Ltd* 1999 SLT 327, Outer House.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(ii) Factors tending to Increase or Aggravate Damages/255. Conduct of defendant's case.

### 255. Conduct of defendant's case.

The general principle that, in assessing damages, the jury may take into account the conduct of the defendant at all material times<sup>1</sup>, extends to his conduct at the trial itself<sup>2</sup> and the conduct of his legal representatives there on his behalf. For example, the damages may properly be increased to take into account a course of cross-examination which suggests that the plaintiff was in fact guilty of a charge of which he had been acquitted<sup>3</sup>, or which is insulting, offensive and ill-founded<sup>4</sup>. However, it may be relevant to show whether counsel was acting on his client's instructions or had his consent to the course taken<sup>5</sup>.

1 *Praed v Graham* (1889) 24 QBD 53 at 55, CA, per Lord Esher MR. See also PARA 251 et seq ante, and the cases there cited.

2 See also PARA 254 ante.

3 *Risk Allah Bey v Whitehurst* (1868) 18 LT 615.

4 *Watt v Watt* [1905] AC 115, HL; *John v MGN Ltd* [1996] 2 All ER 35 at 48, [1996] 3 WLR 593 at 608, CA, per Sir Thomas Bingham MR; see also *Greenlands Ltd v Wilmshurst and London Association for Protection of Trade* [1913] 3 KB 507 at 532, CA, per Hamilton LJ.

5 In *James v Baird* 1916 SC 510, it was suggested that such evidence was essential if aggravated damages were sought; but see *Watt v Watt* [1905] AC 115, HL; *Lamb v West* (1894) 15 NSWLR 120 (NSW FC). See generally *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### (iii) Exemplary Damages

#### 256. Exemplary damages.

Generally, exemplary damages will only be awarded for libel or slander where the plaintiff pleads<sup>1</sup> and proves<sup>2</sup> that, at the time of publication, the defendant knew that the publication would be tortious, or was reckless as to whether or not it was, and nevertheless decided to publish the words complained of because the prospects of material advantage outweighed the prospects of material loss<sup>3</sup>. The mere fact that the words were published in the ordinary course of a business run with a view to profit is not of itself sufficient to establish the required calculation of material advantage<sup>4</sup>. However, a desire to steal a march on competing newspapers in a case of great public interest<sup>5</sup>, or a desire to increase circulation by making a reckless and sensational attack on a prominent person<sup>6</sup>, may suffice to justify an award of exemplary damages. Likewise a calculation that only moderate damages would be awarded or that a plaintiff could be deterred by the enormous costs of fighting an action may suffice<sup>7</sup>. Where recklessness is alleged, the plaintiff must show a lack of honest or genuine belief in the truth of what is published. Carelessness alone, however extreme, is not enough unless it properly justifies an inference that the publisher had no honest belief in the truth of what he published<sup>8</sup>.

Where the above conditions are satisfied, a jury should still only award exemplary damages where the compensatory damages are not themselves sufficient to punish the defendant and to show that tort does not pay. The costs burden on an unsuccessful defendant is not to be taken into account, but the defendant's means, the degree of fault and the amount of any profit made are all relevant factors<sup>9</sup>. An award of exemplary damages may also be made where publication amounts to oppressive, arbitrary or unconstitutional action by a servant of the government<sup>10</sup>.

Where exemplary damages are awarded in the same action against more than one defendant, only one sum can be awarded and it should be assessed by reference to the least guilty defendant or the lowest sum for which any of the defendants can be held liable<sup>11</sup>.

1 Exemplary damages must be specifically pleaded: see PARA 187 ante.

2 If the evidence is insufficient, the trial judge should withdraw the claim from the jury: *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1119, [1972] 1 All ER 801 at 864, HL.

3 *Riches v News Group Newspapers Ltd* [1986] QB 256 at 269, [1985] 2 All ER 845 at 850, CA; *John v MGN Ltd* [1996] 2 All ER 35 at 55-56, [1996] 3 WLR 593 at 616, CA; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL.

4 *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86, [1964] 3 All ER 947, CA; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA; *Manson v Associated Newspapers Ltd* [1965] 2 All ER 954, [1965] 1 WLR 1038; and see the cases cited in note 3 supra.

5 *Manson v Associated Newspapers Ltd* [1965] 2 All ER 954, [1965] 1 WLR 1038 (exemplary damages not awarded).

6 *Maudling v Stott* (1978) Times, 18 March, CA (on an interlocutory hearing an application to strike out the claim was refused).

7 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1088, [1972] 1 All ER 801 at 839, HL, per Lord Reid.

8 *John v MGN Ltd* [1996] 2 All ER 35 at 57, [1996] 3 WLR 593 at 618, CA.

9 *John v MGN Ltd* [1996] 2 All ER 35 at 58, [1996] 3 WLR 593 at 618-619, CA.

10 See the first of Lord Devlin's 'categories of exemplary damages' in *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL.

11 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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## (iv) Special Damages

### 257. Special damage.

Special damages (as distinct from general damages for injury to reputation and hurt feelings<sup>1</sup>) may be awarded in respect of any material temporal injury proved to have been suffered as the natural, and not unduly remote, consequence of the defamatory publication complained of<sup>2</sup>. It is the loss of some material temporal advantage<sup>3</sup>, pecuniary or capable of being estimated in money<sup>4</sup>, which flows directly and in the ordinary course of things<sup>5</sup> from the act of the defendant or an act for which he is responsible<sup>6</sup>. A claim for special damages should be pleaded expressly and particularised<sup>7</sup>.

1 See PARA 248 ante.

2 See DAMAGES vol 12(1) (Reissue) PARA 812.

3 *Roberts v Roberts* (1864) 5 B & S 384.



4 See *Chamberlain v Boyd* (1883) 11 QBD 407, CA (loss of chance to join club not capable of being estimated in money terms); *Ratcliffe v Evans* [1892] 2 QB 524 at 532, CA; *Concaris v Duncan & Co* [1909] WN 51.

5 *Ratcliffe v Evans* [1892] 2 QB 524, CA; *Chamberlain v Boyd* (1883) 11 QBD 407, CA; see also *Lynch v Knight* (1861) 9 HL Cas 577 (overruling *Vicars v Wilcocks* (1806) 8 East 1); *Société Française des Asphaltes v Farrell* (1885) Cab & El 563; *Knight v Gibbs* (1834) 3 Nev & MKB 467; *Speight v Gosnay* (1891) 60 LJQB 231 at 232, CA, per Lopes LJ; *Speake v Hughes* [1904] 1 KB 138, CA; *Ward v Weeks* (1830) 7 Bing 211; *Ward v Lewis* [1955] 1 All ER 55, [1955] 1 WLR 9, CA.

6 *Ratcliffe v Evans* [1892] 2 QB 524 at 529-532, CA.

7 See RSC Ord 18 r 12(1); Ord 82 r 3(3A); *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA; the Supreme Court Practice 1997 para 18/12/16; and PARA 183 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### 258. Examples not amounting to special damage.

The following are examples of what does not amount to special damage: mere injury to feelings<sup>1</sup>; the illness of the plaintiff (illness not ordinarily being a natural result of defamatory words)<sup>2</sup>; the illness of any other person<sup>3</sup>; the death of any other person<sup>3</sup>; the mere loss of the society of acquaintances or friends, as contrasted with the material loss of hospitality<sup>4</sup>; the loss of membership of some society or congregation constituted for religious purposes, the membership of which does not carry with it material temporal advantages<sup>5</sup>; and any damage not pecuniary or capable of being estimated in money<sup>6</sup>.

1 *Weldon v De Bathe* (1884) 54 LJQB 113 at 116, CA, per Brett MR.

2 *Allsop v Allsop* (1860) 5 H & N 534 (approved in *Lynch v Knight* (1861) 9 HL Cas 577); but see *Wilkinson v Downton* [1897] 2 QB 57 (the principle is confined to slander); *Weldon v De Bathe* (1884) as reported in 54 LJQB 113 at 116, CA; and *Wheeler v Somerfield* [1966] 2 QB 94, [1966] 2 All ER 305, CA, per Lord Denning MR. See also *Janvier v Sweeney* [1919] 2 KB 316, CA (malicious falsehood). See, however para 248 text and note 4 ante.

3 *Guy v Gregory* (1840) 9 C & P 584, where evidence of the plaintiff's wife's death following libel was not admitted.

4 As to consortium vicinorum (neighbourly fellowship) see *Roberts v Roberts* (1864) 5 B & S 384; *Weldon v De Bathe* (1884) 54 LJQB 113, CA. As to loss of hospitality see *Moore v Meagher* (1807) 1 Taunt 39, Ex Ch; *Davies v Solomon* (1871) LR 7 QB 112; *Evans v Harries* (1856) 1 H & N 251; *Riding v Smith* (1876) 1 Ex D 91.

5 *Roberts v Roberts* (1864) 5 B & S 384; *Dwyer v Meehan* (1886) 18 LR Ir 138 (words spoken of the plaintiff as a novice were not actionable per se, nor capable of being special damage).

6 See *Chamberlain v Boyd* (1883) 11 QBD 407, CA; see also *Michael v Spiers and Pond Ltd* (1909) 101 LT 352; *Ashley v Harrison* (1793) Peake 194 (a theatre manager cannot sue for libel of an actor, deterring the actor from performing).

## UPDATE

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 258 Examples not amounting to special damage

NOTES--See *Collins Stewart Ltd v The Financial Times Ltd* [2004] EWHC 2337 (QB), [2005] EMLR 64 (loss in market capitalisation of company too uncertain to be acceptable as basis for assessing damages).

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### 259. Examples of special damage.

The following are examples of what may, subject to the principles of remoteness<sup>1</sup>, amount to special damage: loss of consortium of spouse<sup>2</sup>; loss of marriage<sup>3</sup>; loss of material hospitality<sup>4</sup>; loss of employment<sup>5</sup>; loss of a dealing, even if it might have turned out unprofitably<sup>6</sup>; loss of particular customers<sup>7</sup>; a general falling off of profits<sup>8</sup>; and any other material loss<sup>9</sup>.

1 For cases where damage was not too remote see *Knight v Gibbs* (1834) 3 Nev & MKB 467; *Kendillon v Maltby* (1842) Car & M 402; cf *Munster v Lamb* (1883) 11 QBD 588, CA. For cases where the damage was held to be too remote see *Speake v Hughes* [1904] 1 KB 138, CA; *Tunncliffe v Moss* (1850) 3 Car & Kir 83; *Michael v Spiers and Pond Ltd* (1909) 101 LT 352; *Vicars v Wilcocks* (1806) 8 East 1.

2 See *Lynch v Knight* (1861) 9 HL Cas 577; *Roberts v Roberts* (1864) 5 B & S 384; cf *Best v Samuel Fox & Co Ltd* [1952] AC 716, [1952] 2 All ER 394, HL.

3 See *Speight v Gosnay* (1891) 60 LJQB 231, CA.

4 *Moore v Meagher* (1807) 1 Taunt 39, Ex Ch; *Davies v Solomon* (1871) LR 7 QB 112; *Evans v Harries* (1856) 1 H & N 251; *Riding v Smith* (1876) 1 Ex D 91.

5 See the cases cited in note 1 supra, and *Longdon-Griffiths v Smith* as reported in [1950] 2 All ER 662 at 678 (loss of employment is special damage, even if the contract was lawfully determined).

6 *Storey v Challands* (1837) 8 C & P 234, especially the summing up of Lord Denman CJ. However, it seems that the loss of a dealing which could not have made a profit is not included. A trader's refusal to deliver goods without payment in advance can amount to special damage: *King v Watts* (1838) 8 C & P 614.

7 *Bateman v Lyall* (1860) 7 CBNS 638.

8 *Ratcliffe v Evans* [1892] 2 QB 524, CA; and see *Calvet v Tomkies* [1963] 3 All ER 610, [1963] 1 WLR 1397, CA; *Concaris v Duncan & Co* [1909] WN 51.

9 Ie such as has already been defined in PARA 257 ante.

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RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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## (v) Mitigation or Reduction of Damages

### 260. The plaintiff's bad reputation.

Since in an action for libel or slander the plaintiff claims for damages for injury to his reputation<sup>1</sup>, the defendant is entitled<sup>2</sup> to give evidence, in mitigation of damages, as to the plaintiff's general bad reputation<sup>3</sup>. A person should not recover damages for a reputation that is not his. It is the plaintiff's reputation, that is the character he in fact bears in public estimation, which is in issue, not his disposition, that is the character which might be attributed to him on a nice assessment of all his actions; the word 'character' should be used in this context, if at all, with the former meaning only<sup>4</sup>. To be admissible, evidence must be of the plaintiff's general reputation in the community at the time of publication<sup>5</sup>, and may not, except in the case of criminal convictions<sup>6</sup>, relate to specific acts of misconduct<sup>7</sup>. A plaintiff should not face the risk of having his whole life paraded in court if he brings a defamation action. Similarly, the court will not hear evidence that rumours have circulated to the same effect as the words complained of<sup>8</sup>. However, the evidence of bad reputation must relate to the relevant sector of the plaintiff's character<sup>9</sup>.

1 See PARA 248 ante.

2 It is provided the allegation of general bad reputation has been pleaded: RSC Ord 82 r 3(3A).

3 *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1, CA; *Scott v Sampson* (1882) 8 QBD 491; *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL; *Associated Newspapers Ltd v Dingle* [1964] AC 371, [1962] 2 All ER 737, HL; *Waters v Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758, [1961] 1 WLR 967, CA. See also *Kirkman v Oxley* (undated) Philipps on Evidence (4th Edn) p 189n; *Ellershaw v Robinson* (1824); *Mawby v Barber* (1826); *Moore v Oastler* (1836); and *Hardy v Alexander* (1837), all reported in Starkie on the Law of Slander and Libel (3rd Edn) p 538 note (v); *Wood v Cox* (1888) 4 TLR 652 at 655; on appeal (1889) 5 TLR 272, CA.

4 *Plato Films Ltd v Speidel* [1961] AC 1090 at 1129, [1961] 1 All ER 876 at 883, HL, per Lord Radcliffe.

5 *Associated Newspapers Ltd v Dingle* [1964] AC 371, [1962] 2 All ER 737, HL; *Thompson v Nye* (1850) 16 QB 175; *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282 at 286-287, [1988] 1 WLR 116 at 119, CA, per Neill LJ.

6 See PARA 261 post.

7 *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282 at 286, [1988] 1 WLR 116 at 119, CA, per Neill LJ (though note that RSC Ord 82 r 7 has since been revoked); *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL; *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1, CA; *Scott v Sampson* (1882) 8 QBD 491; *Mangena v Wright* [1909] 2 KB 958 at 979. See also *Bracegirdle v Bailey* (1859) 1 F & F 536; *Jones v Stevens* (1822) 11 Price 235.

8 *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1, CA; *Scott v Sampson* (1882) 8 QBD 491; see also *Waithman v Weaver* (1822) 11 Price 257n; *Thompson v Nye* (1850) 16 QB 175; *Bell v Parke* (1860) 11 ICLR 413; *Jones v Stevens* (1822) 11 Price 235; *Earl of Leicester v Walter* (1809) 2 Camp 251; *Plato Films Ltd v Speidel* [1961] AC 1090 at 1136, [1961] 1 All ER 876 at 888, HL, per Lord Denning ('Rumour is a lying jade, begotten by gossip out of hearsay, and is not fit to be admitted to audience in a court of law'); and see *Bennett v Guardian Newspapers Ltd* (1997) Times, 27 February, CA.

9 *Plato Films Ltd v Speidel* [1961] AC 1090 at 1138-1140, [1961] 1 All ER 876 at 889-890, HL, per Lord Denning MR; *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282 at 286, [1988] 1 WLR 116 at 119, CA, per Neill LJ. See also PARA 261 text to note 3 post.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(v) Mitigation or Reduction of Damages/261. The plaintiff's criminal convictions.

#### 261. The plaintiff's criminal convictions.

Notwithstanding the general rule that evidence of particular facts is not admissible to demonstrate reputation<sup>1</sup>, evidence of the plaintiff's previous convictions is admissible<sup>2</sup>, as being cogent evidence that he in fact has a bad reputation. However, the convictions must be relevant in that they must be in the relevant sector of his life, and must have taken place in a relevant period such as to affect his current reputation at the time of publication<sup>3</sup>. Proof of the conviction will be conclusive evidence that the plaintiff in fact committed the offence to which it relates<sup>4</sup>.

1 See PARA 260 ante.

2 Is subject to the Rehabilitation of Offenders Act 1974 s 8 (as amended): see PARAS 92, 101, 143 ante.

3 *Goody v Odhams Press Ltd* [1967] 1 QB 333, [1966] 3 All ER 369, CA; *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282 at 286, [1988] 1 WLR 116 at 119, CA, per Neill LJ.

4 See the Civil Evidence Act 1968 s 13(1) (as amended); and PARA 236 ante.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(v) Mitigation or Reduction of Damages/262. Plaintiff's conduct.

#### 262. Plaintiff's conduct.

The jury may consider the whole conduct of the plaintiff, before and after the action is brought and in court during the trial<sup>1</sup>. A defendant is entitled to rely in this context on any evidence which is properly before the court and jury<sup>2</sup>. In particular the jury may have regard to any misconduct by the plaintiff which the defendant has proved by way of partial justification<sup>3</sup>. The defendant may prove in mitigation of damages that the plaintiff provoked the words of which he complains<sup>4</sup> by using expressions, oral or written, which reflected on the defendant and

which came to his notice before he published the words complained of<sup>5</sup> and were calculated to provoke him to do so<sup>6</sup>. Mere general evidence that it was the plaintiff's habit to libel the defendant will not suffice; the particular incidents must be proved<sup>7</sup>. The expressions relied on to show provocation must relate to the same subject as the words complained of<sup>8</sup>, but the fact that the plaintiff's words may have been true does not prevent the defendant from using them in mitigation<sup>9</sup>.

1 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071, [1972] 1 All ER 801 at 824, HL, per Lord Hailsham of St Marylebone LC.

2 *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282 at 287, [1988] 1 WLR 116 at 120, CA, per Neill LJ.

3 See note 2 supra.

4 *Tarpley v Blaby* (1835) 7 C & P 395; affd (1836) 2 Bing NC 437; *Watts v Fraser* (1835) 7 C & P 369 (subsequent proceedings (1837) 7 Ad & El 223); *Moore v Oastler* (1836) Starkie on the Law of Slander and Libel (3rd Edn) p 538 note (v); *Pasquin's Case* (circa 1800) cited in *Finnerty v Tipper* (1809) 2 Camp 72 at 76, and *Tabart v Tipper* (1808) 1 Camp 350.

5 *Watts v Fraser* (1837) 2 Nev & PKB 157.

6 See the cases cited in note 4 supra.

7 *Wakley v Johnson* (1826) Ry & M 422; *Finnerty v Tipper* (1809) 2 Camp 72 at 76. As to pleading see PARA 175 ante.

8 *Finnerty v Tipper* (1809) 2 Camp 72; *May v Brown* (1824) 3 B & C 113.

9 *Fraser v Berkeley* (1836) 7 C & P 621.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(v) Mitigation or Reduction of Damages/263. Repetition and disclosure of source.

### 263. Repetition and disclosure of source.

Although it is neither a defence nor a mitigation to show that the defendant copied a libel from another source<sup>1</sup>, or that, at the time he published it, it was already in circulation<sup>2</sup>, it may be relevant to damages to show that he both copied it from another source and disclosed or referred to that source in the defamatory publication<sup>3</sup>. This principle applies equally to the repetition of a slander<sup>4</sup>.

Repetition without disclosure of source may nevertheless be relevant to damages if it serves to negate the existence of express malice<sup>5</sup>, for example where the defendant, in copying the words, omitted some parts reflecting adversely on the plaintiff<sup>6</sup>.

1 *Talbutt v Clark* (1840) 2 Mood & R 312; cf *Saunders v Mills* (1829) 6 Bing 213.

2 *Saunders v Mills* (1829) 6 Bing 213 (approved on this point in *Associated Newspapers v Dingle* [1964] AC 371, [1962] 2 All ER 737, HL); *Creevy v Carr* (1835) 7 C & P 64. See, however para 266 post.

3 *Mullet v Hulton* (1803) 4 Esp 248.

4 *Bennett v Bennett* (1834) 6 C & P 588.

5 See PARA 264 post.

6 *Pearson v Lemaitre* (1843) 5 Man & G 700 at 719 per Tindal CJ; *Davis v Cutbush* (1859) 1 F & F 487; *Creevy v Carr* (1835) 7 C & P 64.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(v) Mitigation or Reduction of Damages/264. Absence of express malice.

#### 264. Absence of express malice.

In any case where a plaintiff alleges that the defendant was malicious in publishing the words, malice being admissible to aggravate damages<sup>1</sup>, a defendant may give his reasons for publishing them, including any grounds for belief in their truth, provided that he does not go so far as to attempt a justification where that defence is not pleaded<sup>2</sup>. The personal malice of the writer of a libel should not be attributed to the subsequent publisher in assessing damages against that publisher<sup>3</sup>.

1 Express malice will aggravate the damages: see PARA 251 ante.

2 *Saunders v Mills* (1829) 6 Bing 213; approved in *Pearson v Lemaitre* (1843) 5 Man & G 700. See also *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1 at 46, CA, per Greer LJ; *Jones v E Hulton & Co* [1909] 2 KB 444 at 479, CA, per Farwell LJ.

3 *Robertson v Wylde* (1838) 2 Mood & R 101; cf *Crozier v Wishart Books Ltd* [1936] 1 KB 471, [1936] 1 All ER 1, CA. See also PARAS 155-156 ante as to malice and joint tortfeasors. Where aggravated damages are sought and there is more than one defendant, they should be assessed by reference to the least guilty defendant or the lowest sum for which any of the defendants could be held liable: *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(v) Mitigation or Reduction of Damages/265. Apology.

## 265. Apology.

An apology, especially a prompt or public one, is a powerful mitigating factor<sup>1</sup>. By statute a defendant may, after giving the plaintiff written notice of his intention to do so at the time of serving or filing his defence, give in evidence in mitigation of damages the fact that he made or offered an apology for the defamation to the plaintiff before the commencement of the action, or as soon afterwards as he had the opportunity of so doing, if the action has been commenced before there was such an opportunity<sup>2</sup>. However, it is clear that the making of an apology is a matter that can always be given in evidence, regardless of the time at which the apology was made<sup>3</sup>, provided it has been pleaded<sup>4</sup>.

1 *John v MGN Ltd* [1996] 2 All ER 35 at 59, [1996] 3 WLR 593 at 620, CA.

2 Libel Act 1843 s 1.

3 *Smith v Harrison* (1856) 1 F & F 565, where the offer of apology was made after the commencement of the action.

4 RSC Ord 82 r 3(3A).

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(v) Mitigation or Reduction of Damages/266. Previous award of damages.

## 266. Previous award of damages.

In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words<sup>1</sup> to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication<sup>2</sup>. In such a case, the jury should be directed to consider how far the damage suffered by the plaintiff can reasonably be attributed solely to the libel with which the jury is concerned, and how far it is the joint result of the two libels; if some part of the damage is the joint result of the two libels, the jury should bear in mind that the plaintiff ought not to be compensated twice for the same loss<sup>3</sup>.

Where more than one action is brought in respect of damage by or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise), the plaintiff is not entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action<sup>4</sup>.

1 As to the meaning of 'words' see PARA 11 note 1 ante.

2 Defamation Act 1952 s 12.

3 *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, [1963] 2 All ER 151, HL.

4 Civil Liability (Contribution) Act 1978 s 4. See further DAMAGES.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(vi) New Trials and Appeals in relation to Damages/267. Appeal on ground of excessive damages.

## (vi) New Trials and Appeals in relation to Damages

### 267. Appeal on ground of excessive damages.

Formerly, the Court of Appeal would rarely interfere with the jury's verdict on the ground that the damages were excessive or inadequate<sup>1</sup>. However, jury awards are now subject to more searching scrutiny in the Court of Appeal which will interfere if a reasonable jury could not have thought it necessary to compensate the plaintiff and to re-establish his reputation<sup>2</sup>. In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are either excessive or inadequate, the court may, instead of ordering a new trial, substitute such sum as appears to the court to be proper<sup>3</sup>. The court will also interfere with the verdict if it sees that the jury in assessing the damages has been guilty of misconduct, or has made some gross blunder, or has been misled by the speeches of counsel, but will not interfere merely because the Court of Appeal would have given less damages.

1 *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 at 585, CA; *English and Scottish Co-operative Properties, Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440, [1940] 1 All ER 1, CA; *Ley v Hamilton* (1935) 153 LT 384 at 386, HL; *Watt v Watt* [1905] AC 115 at 118, HL; *Chapman v Lord Ellesmere* [1932] 2 KB 431 at 455, 456, 472, 477, CA; *Theaker v Richardson* [1962] 1 All ER 229, [1962] 1 WLR 151, CA; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL.

2 *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670 at 692, [1993] 4 All ER 975 at 994, CA; *John v MGN Ltd* [1996] 2 All ER 35, [1996] 3 WLR 593, CA. See also *Praed v Graham* (1889) 24 QBD 53 at 55, CA, per Lord Esher MR; *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, CA; *Ley v Hamilton* (1935) 153 LT 384, HL; *Rubber Improvement Ltd v Daily Telegraph, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, [1963] 2 All ER 151, HL; *M'Grath v Bourne* (1876) IR 10 CL 160; *Harris v Arnott* (1890) 26 LR 1r 55, CA; *English and Scottish Co-operative Properties, Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440, [1940] 1 All ER 1, CA (a serious innuendo was proved; a farthing damages granted; and the new trial limited to damages); *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA; *Watt v Watt* [1905] AC 115 at 118, HL, per Lord Halsbury C; and see DAMAGES vol 12(1) (Reissue) PARAS 1161-1163.

3 RSC Ord 59 r 11(4).

## UPDATE

### 168-273 Pleading, Practice and Relief



RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(vi) New Trials and Appeals in relation to Damages/268. Appeal on ground of inadequacy of damages.

## **268. Appeal on ground of inadequacy of damages.**

Where the low level of damages shows that the jury has made a compromise and instead of deciding the issue of liability has agreed to find for the plaintiff for nominal damages only, the Court of Appeal has the power to order a new trial or order a more substantial award to be substituted<sup>1</sup>, such a case being in effect as if the jury had been discharged without a verdict<sup>2</sup>. If the words are grossly slanderous, and there is no evidence whatever that the plaintiff has done anything to reduce the damages, nominal damages may be treated by the court as a species of compromise and no true verdict at all, even if the plaintiff may not have proved any actual damage<sup>3</sup>. However, if there has been no misconduct on the jury's part and it has decided the question of liability, the court cannot interfere because the damages are low unless there has been some mistake on the judge's part or in the calculation of figures by the jury<sup>4</sup>. A new trial may be ordered in slander actions on the same basis as in libel actions<sup>5</sup>.

1 RSC Ord 59 r 11(4).

2 *Falvey v Stanford* (1874) LR 10 QB 54 at 56.

3 *Falvey v Stanford* (1874) LR 10 QB 54 at 56 (a halfpenny damages); and see *English and Scottish Co-operative Properties, Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440, [1940] 1 All ER 1, CA.

4 *Rendall v Hayward* (1839) 5 Bing NC 424 (£1 damages for malicious allegation of theft; no new trial ordered); *Kelly v Sherlock* (1866) LR 1 QB 686 at 695; *Forsdike v Stone* (1868) LR 3 CP 607 at 612; *English and Scottish Co-operative Properties, Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440, [1940] 1 All ER 1, CA (farthing award; new trial ordered).

5 *Armytage v Haley* (1843) 4 QB 917 seems to be too wide; see also *Rendall v Hayward* (1839) 5 Bing NC 424.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(vi) New Trials and Appeals in relation to Damages/269. Appeal against damages awarded by judge alone.

## **269. Appeal against damages awarded by judge alone.**

Where there is an appeal in an action tried without a jury, the appeal is a rehearing and the Court of Appeal has power itself to increase or reduce the damages in order to save costs<sup>1</sup>; but a new trial may be ordered<sup>2</sup>. A judge sitting alone need not reduce the award of damages to take account of his public condemnation of the defendant in open court<sup>3</sup>.

1 See DAMAGES vol 12(1) (Reissue) PARA 1161.

2 See RSC Ord 59 r 11; and CIVIL PROCEDURE.

3 *Bull v Vazquez* [1947] 1 All ER 334 at 336-337, CA, per Lord Greene MR (not following *Rook v Fairrie* [1941] 1 KB 507, [1941] 1 All ER 297, CA); see further *Associated Newspapers Ltd v Dingle* [1964] AC 371 at 403-404, [1962] 2 All ER 737 at 749-750, HL, per Lord Morton of Henryton.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/ (7) DAMAGES/(vi) New Trials and Appeals in relation to Damages/270. Time for appeal.

#### 270. Time for appeal.

Although the court has discretion to extend the time permitted for appeal<sup>1</sup>, it is proper to refuse extension when substantial delay has taken place and no sufficient explanation has been put forward, even when the party seeking the extension is ready to pay all costs occasioned by the delay; this is true even if no injustice would follow the grant of the extension<sup>2</sup>.

1 See RSC Ord 3 r 5; and CIVIL PROCEDURE.

2 *Revici v Prentice Hall Inc* [1969] 1 All ER 772, [1969] 1 WLR 157, CA. See generally CIVIL PROCEDURE.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(8) FINAL INJUNCTIONS/271. Injunction to restrain publication.

## (8) FINAL INJUNCTIONS

#### 271. Injunction to restrain publication.

The High Court has jurisdiction to grant an injunction<sup>1</sup> at the trial of an action to restrain publication of defamatory words or matter in all cases in which the court thinks it just and convenient to do so<sup>2</sup>. The court will accordingly grant an injunction if it is satisfied that the words complained of are defamatory of the plaintiff or, in the case of slander, calculated to disparage him in his office, profession, calling, trade or business held or carried on by him at the time of the publication, and there is reason to apprehend a repetition of the wrong<sup>3</sup>.

The jurisdiction is not confined to libels or slanders which affect the plaintiff's property, trade or business; there is no logical distinction between a case affecting property or trade and one affecting character<sup>4</sup>. The jurisdiction extends to actions of slander as well as to actions of libel, although the courts naturally exhibit greater caution in granting an injunction in the case of spoken words than in the case of written or printed statements<sup>5</sup>.

1 For the general law as to injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. As to interlocutory injunctions see PARA 170 et seq ante, 287 text and note 6 post.

2 See the Supreme Court Act 1981 s 37(1); and CIVIL PROCEDURE vol 11 (2009) PARAS 347-349.

3 *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1903) 52 WR 254; revsd on the facts (1904) 20 TLR 579, CA; *Poulett v Chatto and Windus* (1887) 4 TLR 35; on appeal 4 TLR 142, CA; *Salomons v Knight* [1891] 2 Ch 294, CA; *Monson v Tussauds Ltd, Monson v Louis Tussaud* [1894] 1 QB 671 at 690, CA, per Lord Halsbury and at 698 per Davey LJ.

4 *Monson v Tussauds Ltd, Monson v Louis Tussaud* [1894] 1 QB 671 at 690, CA.

5 *Hermann Loog v Bean* (1884) 26 ChD 306, CA, where the jurisdiction was exercised. If necessary a mandatory injunction will be granted: *Hermann Loog v Bean* supra.

## UPDATE

### 168-273 Pleading, Practice and Relief

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 271 Injunction to restrain publication

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(8) FINAL INJUNCTIONS/272. Service out of the jurisdiction.

### 272. Service out of the jurisdiction.

Service out of the jurisdiction of a writ or notice of a writ may be allowed by the court where an injunction is sought to restrain the publication of a libel within the jurisdiction<sup>1</sup>. However, the discretion will be cautiously and sparingly exercised and only in a very exceptional case<sup>2</sup>.

1 See RSC Ord 11 r 1(1)(b); and CIVIL PROCEDURE.

2 *Dunlop Rubber Co v Dunlop* [1921] 1 AC 367 at 372-373, HL, per Lord Birkenhead C (a case under the corresponding Irish rules of court).

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/3. PLEADING, PRACTICE AND RELIEF/(8) FINAL INJUNCTIONS/273. Defamation of election candidates.

#### **273. Defamation of election candidates.**

Any person who makes or publishes any false statement of fact in relation to the personal character or conduct of a candidate for any parliamentary or local government election may be restrained by interim or perpetual injunction from any repetition of it<sup>1</sup>.

1 See ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 669.

## **UPDATE**

### **168-273 Pleading, Practice and Relief**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(1) THE CAUSE OF ACTION/274. Malicious or injurious falsehood.

## **4. MALICIOUS FALSEHOOD**

### **(1) THE CAUSE OF ACTION**

#### **274. Malicious or injurious falsehood.**

At common law an action will lie for written or oral<sup>1</sup> falsehoods<sup>2</sup> which are published maliciously<sup>3</sup> and are calculated in the ordinary course of things to produce, and do produce, actual damage<sup>4</sup>. Such an action is not one of libel or of slander, but an action for damage wilfully and intentionally done without lawful occasion or excuse<sup>5</sup>. At common law special damage is always necessary, but this rule has been modified by statute<sup>6</sup>.

The cause of action survives to an executor or administrator<sup>7</sup> and passes to a trustee in bankruptcy<sup>8</sup> unless the falsehood relates more to the character than the property or business of the plaintiff.

The actions for slander of title<sup>9</sup> and slander of goods<sup>10</sup>, formerly regarded as separate causes of action, are now viewed as examples of the general tort of malicious falsehood<sup>11</sup>. They are sometimes described, misleadingly, as 'trade libels'.

1 *Ratcliffe v Evans* [1892] 2 QB 524 at 527, CA; *Leetham v Rank* (1912) 57 Sol Jo 111, CA. As to words which also impute misconduct to the owner or the person who deals in the property and so are defamatory in the strict sense see PARAS 4, 55 ante. As to where circulars which falsely represented that a business in the hands of a receiver and manager was at an end, and invited customers to transfer their custom, was held a contempt of court see *Helmore v Smith (No 2)* (1886) 35 ChD 449, CA; and CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 437, 441. As to a corporation's right to sue see PARA 25 ante. As to the functions of the judge see PARA 238 et seq ante.

2 The onus is on the plaintiff to show that the words are false; it is otherwise in an action for libel or slander, where the falsity is presumed. For a case of passing-off which also amounted to malicious falsehood see *Wilts United Dairies Ltd v Thomas Robinson, Sons & Co Ltd* [1957] RPC 220; affd [1958] RPC 94, CA; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARAS 317, 319.

3 As to malice see PARAS 282-283 post. For a review of malice in relation to defamation see *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL.

4 *Ratcliffe v Evans* [1892] 2 QB 524 at 527, CA; *Leetham v Rank* (1912) 57 Sol Jo 111, CA; *Evans v Harlow* (1844) 5 QB 624; *Young v Macrae* (1862) 3 B & S 264 at 269 (where the defendants compared the plaintiff's oil with another to the former's disadvantage, and the court held that the declaration was insufficient, for it may be that the defendant had alleged what was true of the plaintiff's oil and what was false of some other person's by attributing to that other person's oil a character of superiority which it did not possess); *Western Counties Manure Co v Lawes Chemical Manure Co* (1874) LR 9 Exch 218, distinguishing *Young v Macrae* supra; *Halsey v Brotherhood* (1881) 19 ChD 386, CA; affg (1880) 15 ChD 514 at 518; *Hatchard v Mège* (1887) 18 QBD 771 at 775; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, CA; *White v Mellin* [1895] AC 154 at 160, 166, 167, HL; *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at 99, HL; *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1903) 20 TLR 88; revsd on the facts (1904) 20 TLR 579, CA; *Alcott v Millar's Karri and Jarrah Forests Ltd* (1904) 21 TLR 30 at 31, CA; *Lyne v Nicholls* (1906) 23 TLR 86. See also *Riding v Smith* (1876) 1 Ex D 91, where there was evidence of general loss of custom although the plaintiff failed to prove loss of particular customers (see *Ratcliffe v Evans* supra at 534); followed in *Thomas v Williams* (1880) 14 ChD 864.

5 *Ratcliffe v Evans* [1892] 2 QB 524 at 527, CA, per Bowen LJ. See PARA 275 post.

6 As to the statutory exceptions see PARA 285 post.

7 *Hatchard v Mège* (1887) 18 QBD 771, DC: see PARA 29 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 814 et seq.

8 See PARA 24 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 434-435.

9 As to slander of title see PARA 276 post.

10 As to slander of goods see PARA 277 post.

11 See the Defamation Act 1952 s 3(1) ('In an action for slander of title, slander of goods, or other malicious falsehood....'); and PARA 285 post.

## UPDATE

### 274 Malicious or injurious falsehood

TEXT AND NOTES 1-5--In the context of a dispute between competing manufacturers producing similar products, the tort of malicious falsehood encompasses nothing more than disparaging statements about the plaintiff or his goods: *Schulke & Mayr UK Ltd v Alkapharm UK Ltd* [1999] FSR 161.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(1) THE CAUSE OF ACTION/275. Comparison with defamation.

### 275. Comparison with defamation.

Actions for malicious falsehood<sup>1</sup> are in a category of their own and are quite distinct from actions for defamation<sup>2</sup>. These actions are not concerned with injury to reputation<sup>3</sup>.

In an action for defamation, to establish his cause of action, the plaintiff must prove that the words<sup>4</sup> referred to him and bore a meaning defamatory of him<sup>5</sup>. To establish his cause of action in an action for slander of title or goods or other malicious falsehood, the plaintiff must prove that the words were false, that they were published maliciously and, unless covered by the statutory exceptions, that they caused him special damage<sup>6</sup>.

1 As to actions for malicious falsehood see PARA 274 ante.

2 As to actions for defamation see PARA 1 et seq ante.

3 The distinction is fully analysed in *Joyce v Sengupta* [1993] 1 All ER 897, [1993] 1 WLR 337, CA; and is also considered in *Kaye v Robertson* [1991] FSR 62, CA.

4 For the meaning of 'words' see PARA 11 note 1 ante.

5 See PARA 39 ante.

6 See PARA 285 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(1) THE CAUSE OF ACTION/276. Slander of title.

## 276. Slander of title.

An action for slander of title lies against anyone who falsely<sup>1</sup> and maliciously<sup>2</sup> disparages the title of an owner of real or personal property<sup>3</sup>, and by doing so, unless the circumstances of the case bring it within the statutory exceptions<sup>4</sup>, causes him special damage<sup>5</sup>. The burden of proving falsity, publication in disparagement of the plaintiff's title, malice and, where necessary, special damage is on the plaintiff<sup>6</sup>.

Disparagement of title for this purpose consists in alleging that the owner has no title or a defective or limited title to the property<sup>7</sup>, or has no right or a limited right to deal with it<sup>8</sup>. Causing inconvenience or annoyance by risk of confusion of two properties does not give rise to the cause of action<sup>9</sup>. The disparagement may be either oral or written<sup>10</sup>.

At common law special damage is essential to the cause of action<sup>11</sup>. However, by statute it is not necessary to allege or prove special damage in certain cases<sup>12</sup>. It is sufficient evidence of special damage that the person to whom the words were spoken wrongfully deprived the plaintiff of his property and it is no answer to say that the only remedy is against that person<sup>13</sup>.

1 *British Railway Traffic and Electric Co Ltd v CRC Co Ltd and London County Council* [1922] 2 KB 260 at 267 per McCardie J.

2 Ie with actual malice, as to which see PARAS 282-283 post. For a review of the law of malice in relation to defamation see *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL.

3 Although it has been suggested that the term 'slander of title' applies only to cases of real property (*Halsey v Brotherhood* (1881) 19 ChD 386 at 389, CA), it seems clear that it may be applied to cases of personal property (*Wren v Weild* (1869) LR 4 QB 730 at 734; *Baker v Piper* (1886) 2 TLR 733). Purely personal property was in question in *Newman v Zachary* (1646) Aleyn 3; *Rowe v Roach* (1813) 1 M & S 304; *Green v Button* (1835) 2 Cr M & R 707; *Gutsole v Mathers* (1836) 1 M & W 495; *Carr v Duckett* (1860) 5 H & N 783; *Steward v Young* (1870) LR 5 CP 122 (evidence must show intent to injure); and *Ratcliffe v Evans* [1892] 2 QB 524 at 533, CA. As to leaseholds see *Smith v Spooner* (1810) 3 Taunt 246; *Millman v Pratt* (1824) 2 B & C 486; *Watson v Reynolds* (1826) Mood & M 1. It is immaterial whether the plaintiff's title is in possession or in reversion or remainder

(*Bliss v Stafford* (1573) Owen 37; *Vaughan v Ellis* (1608) Cro Jac 213; *Baker v Piper* supra), or, it seems, legal or equitable (*Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1903) 20 TLR 88 per Walton J; revsd on other grounds (1904) 20 TLR 579, CA). The point of difficulty in *Millman v Pratt* supra would now be met by amendment on terms.

4 See the text and note 12 infra.

5 *Hatchard v Mège* (1887) 18 QBD 771 at 774-775, DC, where it is said that the action lies 'against anyone who maliciously decries the plaintiff's goods or some other thing belonging to him and thereby produces special damage to the plaintiff'. The gist of the action at common law is that the statement should have been made maliciously and have caused special damage to the plaintiff: *Loudon v Ryder (No 2)* [1953] Ch 423 at 427, [1953] 1 All ER 1005 at 1007.

6 *Pater v Baker* (1847) 3 CB 831; *Burnett v Tak* (1882) 45 LT 743; see also *Rowe v Roach* (1813) 1 M & S 304; *Royal Baking Powder Co v Wright Crossley & Co* (1900) 18 RPC 95, HL.

7 The slander must be such as goes to defeat the plaintiff's title (*Cane v Golding* (1649) Sty 169, 176; *Hargrave v Le Breton* (1769) 4 Burr 2422 at 2423), or causes another to disturb the plaintiff's possession (*Newman v Zachary* (1646) Aleyn 3), or to withhold property to which the plaintiff is entitled (*Green v Button* (1835) 2 Cr M & R 707).

8 *Manning v Avery* (1673) 3 Keb 153 (allegation that the plaintiff had mortgaged all his land); *Green v Button* (1835) 2 Cr M & R 707; *Pater v Baker* (1847) 3 CB 831.

9 See *Day v Brownrigg* (1878) 10 ChD 294, CA (use of the same name for a house as was used for a neighbour's house; no malice or intent to injure); *Street v Union Bank of Spain and England* (1885) 30 ChD 156 (adoption of telephone address identical with name by which plaintiffs were known). As to the use of trade names generally and the tort of passing-off see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 304 et seq.

10 *Malachy v Soper* (1836) 3 Bing NC 371 at 385-386.

11 *Law v Harwood* (1628) Cro Car 140 (no such action lies without showing 'special prejudice .. without showing particularly the cause of loss .. as that he could not let or sell the said lands'); *Cane v Golding* (1649) Sty 169, 176 ('a particular damage'; 'a special damage'); *Hargrave v Le Breton* (1769) 4 Burr 2422 at 2423; *Green v Button* (1835) 1 Cr M & R 707; *Gutsole v Mathers* (1836) 1 M & W 495; *Malachy v Soper* (1836) 3 Bing NC 371 at 386; *Pater v Baker* (1847) 3 CB 831; *Brook v Rawl* (1849) 19 LJ Ex 114; *Wren v Weild* (1869) LR 4 QB 730; *Ratcliffe v Evans* [1892] 2 QB 524 at 528, CA; *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at 99, HL; *Barrett v Associated Newspapers Ltd* (1907) 23 TLR 666, CA (statement that plaintiff's house was haunted, but no special damage shown; judgment for defendants); *British Railway Traffic and Electric Co Ltd v CRC Co Ltd and London County Council* [1922] 2 KB 260; *Farr v Weatherhead and Harding* (1932) 49 RPC 262; and see *Mildmay's Case* (1584) 1 Co Rep 175a at 177a; and the notes to 2 Wms Saund (1871 Edn) 361 at 383.

12 See the Defamation Act 1952 s 3; and PARA 285 post.

13 *Green v Button* (1835) 2 Cr M & R 707, doubting *Vicars v Wilcocks* (1806) 8 East 1, and *Morris v Langdale* (1800) 2 Bos & P 284 at 289 per Lord Eldon. *Vicars v Wilcocks* supra was also disapproved in *Bowen v Hall* (1881) 6 QBD 333, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(1) THE CAUSE OF ACTION/277. Slander of goods.

## 277. Slander of goods.

An action for slander of goods will lie where the defendant falsely and maliciously<sup>1</sup> publishes<sup>2</sup> words<sup>3</sup> of and concerning the plaintiff's goods and where the publication causes the plaintiff to suffer special damage<sup>4</sup>.

<sup>1</sup> ie with actual malice: see PARA 282 post. See also PARA 276 text and note 6 ante.

<sup>2</sup> As to publication see PARA 60 et seq ante.

3 For the meaning of 'words' see PARA 11 note 1 ante.

4 Is subject to the exceptions specified in the Defamation Act 1952 s 3: see PARA 285 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(1) THE CAUSE OF ACTION/278. Mere puff insufficient.

### **278. Mere puff insufficient.**

It is not actionable for a trader to proclaim that his own goods are equal or superior to those of his rivals, even if the words are false and cause special damage<sup>1</sup>. However, it is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's goods<sup>2</sup>. Where a trader makes a statement derogatory of a rival's goods the test to be applied in deciding whether it is actionable is whether or not a reasonable person would take the claim being made as serious<sup>3</sup>.

1 *Evans v Harlow* (1844) 5 QB 624; *Young v Macrae* (1862) 3 B & S 264; *White v Mellin* [1895] AC 154, HL; *Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark* [1899] 1 QB 86, CA; *Alcott v Millar's Karri and Jarrah Forests Ltd* (1904) 91 LT 722, CA; and see *Harman v Delany* (1731) 2 Stra 898; *Western Counties Manure Co v Lawes Chemical Manure Co* (1874) LR 9 Exch 218 at 221 per Bramwell B. The case may be different where the parties are not rivals in trade: *Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark* supra at 94.

2 Eg a statement that the circulation of the defendant's newspaper is 20 to one of that of the plaintiff's paper (*Lyne v Nicholls* (1906) 23 TLR 86; cf *Heriot v Stuart* (1796) 1 Esp 437); that the plaintiff's wood paving blocks are 'in a rotten condition' (*Alcott v Millar's Karri and Jarrah Forests Ltd* (1904) 91 LT 722, CA, distinguishing *Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark* [1899] 1 QB 86, CA); that the defendant's goods are the only genuine ones and the article manufactured by others is spurious (*James v James* (1872) LR 13 Eq 421); and see *Young v Macrae* (1862) 3 B & S 264; *Spalding & Bros v AW Gamage Ltd* (1915) 84 LJ Ch 449, HL (representation that goods which are not a trader's goods or his goods of a particular class or quality are that trader's goods or goods of that particular class or quality); *Cellactite and British Uralite Ltd v HH Robertson Co Inc* (1957) Times, 23 July, CA (words going far beyond legitimate comparison between the defendant's goods and those of a rival trader).

3 *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] 2 All ER 599 at 605, [1975] 1 WLR 972 at 978 per Walton J; and see *Vodafone Group plc v Orange Personal Communications Services Ltd* [1997] EMLR 84.

## **UPDATE**

### **278 Mere puff insufficient**

NOTES 2, 3--See *DSG Retail Ltd v Comet Group plc* [2002] EWHC 116 (QB), [2002] FSR 899 (advertisements making misleading comparisons with competitor's prices).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(1) THE CAUSE OF ACTION/279. Publication by agent.

### **279. Publication by agent.**

A principal is vicariously liable for his agent's false statements, made within his ostensible authority as such, and for his agent's express malice in making such statements<sup>1</sup>. Where, however, the agent was not malicious, the principal's knowledge may not be attributed to the



agent, so as to make either of them liable<sup>2</sup>. Nor may the agent be held liable for the malice of the principal, if not actually known to him at the time of publication<sup>3</sup>.

1 See AGENCY vol 1 (2008) PARA 151.

2 See *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA (a libel case, but it is submitted that the same principles will apply in malicious falsehood).

3 See *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA (again, a defamation case); and see AGENCY vol 1 (2008) PARA 164.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(2) PLEADING/280. Pleading.

## (2) PLEADING

### 280. Pleading.

The words<sup>1</sup> complained of must be set out by the plaintiff verbatim as in the case of an action for libel or slander<sup>2</sup>. The plaintiff must also plead and prove that the words are false. He must plead the facts on which he relies to prove actual malice against the defendant<sup>3</sup>.

Special damage, except where by statute it is unnecessary for the plaintiff to allege it<sup>4</sup>, must also be expressly pleaded and proved<sup>5</sup>.

1 For the meaning of 'words' see PARA 11 note 1 ante.

2 See *Gutsole v Mathers* (1836) 1 M & W 495; and PARA 176 ante. As to the allegation of falsity see *Rowe v Roach* (1813) 1 M & S 304.

3 See RSC Ord 18 r 12(1)(b).

4 See the Defamation Act 1952 s 3; and PARA 285 post.

5 *Malachy v Soper* (1836) 3 Bing NC 371 at 384 per Tindal CJ. Apparently, as in the case of an action for slander not actionable per se, the plaintiff can only recover such damages as he alleges and proves (cf para 19 ante). If a plaintiff relies on the Defamation Act 1952 s 3, he cannot introduce evidence of special damage without pleading it: *Calvet v Tomkies* [1963] 3 All ER 610 at 612, [1963] 1 WLR 1397 at 1399-1400, CA, per Lord Denning MR. The degree of particularity required in an allegation of special damage necessarily depends on circumstances, eg a plaintiff who has lost an intended sale cannot be expected to set out the names of persons who would have been prepared to purchase: *Hargrave v Le Breton* (1769) 4 Burr 2422 at 2423; cf para 286 post. As to the pleading of special damage generally see DAMAGES vol 12(1) (Reissue) PARAS 1145, 1149 et seq.

## UPDATE

### 280 Pleading

TEXT AND NOTE 3--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(2) PLEADING/281. Special damage.

## 281. Special damage.

According to the old cases of slander of title it was necessary in proof of special damage to show that before the words were spoken there had been a communication<sup>1</sup> between the plaintiff and some person with regard to a sale of, or other dealing with, the property, and that by reason of the words that sale or dealing went off<sup>2</sup>, or the plaintiff received less for the property than he would otherwise have done<sup>3</sup>. It was not enough that the plaintiff merely intended to sell or deal with the property<sup>4</sup>, or merely had an interest in it<sup>5</sup>. However, these cases are probably only instances of the required special damage; such damage may equally be found in other circumstances<sup>6</sup>.

1 This is referred to as 'colloquium' in the old cases.

2 *Gresham v Grinsley* (1607) Yelv 88; *Smead v Badley* (1616) Cro Jac 397; *Tasburgh v Day* (1618) Cro Jac 484. See also *Lovett v Weller* (1616) 1 Roll Rep 409; *Cane v Golding* (1649) Sty 169, 176.

3 *Brook v Rawl* (1849) 19 LJ Ex 114.

4 *Smead v Badley* (1616) Cro Jac 397; *Manning v Avery* (1673) 3 Keb 153.

5 *Smead v Badley* (1616) Cro Jac 397.

6 *Malachy v Soper* (1836) 3 Bing NC 371 at 384 per Tindal CJ; and see generally paras 285-286 post.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(3) MALICE/282. Proof of malice in actions for malicious falsehood.

## (3) MALICE

### 282. Proof of malice in actions for malicious falsehood.

In actions for slander of goods<sup>1</sup> or other malicious falsehood<sup>2</sup>, malice is an essential element<sup>3</sup>. 'Malice', in this connection, bears the same meaning as 'express malice' in the tort of defamation<sup>4</sup>, namely a dominant improper motive of causing injury to the plaintiff<sup>5</sup>. Such a motive is generally to be inferred from knowledge that the words were false, the absence of an honest belief that they were true, or recklessness, not caring whether they were true or false<sup>6</sup>. Several inaccuracies may constitute evidence of malice<sup>7</sup>. There is no evidence of malice if all that is shown is that the defendant wrote or spoke honestly, even though wrongly, in defence of a real or supposed right or title to the property<sup>8</sup>, or carelessly, believing the words to be true<sup>9</sup>, or merely for the purpose of advancing the sale of his own goods<sup>10</sup>, or in pursuance of a duty<sup>11</sup>.

A mistake of law is no evidence of malice<sup>12</sup>, but it is clearly malicious in this context to publish the words knowing them to be untrue<sup>13</sup>.

1 As to the nature of actions for slander of goods see PARA 277 ante.

2 As to the nature of actions for malicious falsehood see PARA 274 ante.

3 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 777, HL, per Lord Blackburn. See the cases cited in PARA 274 note 4 ante; and as to the cases on slander of title relating to this point see PARAS 283-284 post. As to malice generally see PARAS 16, 149 et seq ante. The question whether the words were false and malicious is a question of fact for the court: *Hatchard v Mège* (1887) 18 QBD 771 at 775, DC; *Halsey v Brotherhood* (1881) 19 ChD 386 at 389, CA. See also *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at 99, HL (where maliciously was said to mean 'without just cause or excuse ... or an

absence of bona fides'); cf *Halsey v Brotherhood* supra at 389 ('reasonable and probable cause' is necessary). It is not essential that the defendant should actually follow up a threat by proceedings. The question is whether the threat was made bona fide: *Halsey v Brotherhood* (1880) 15 ChD 514 at 517-518 per Jessel MR, disapproving *Rollins v Hinks* (1872) LR 13 Eq 355. See also *Axmann v Lund* (1874) LR 18 Eq 330. As to threats of patent infringement proceedings see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 557 et seq.

4 *Spring v Guardian Assurance plc* [1993] ICR 412, [1993] 2 All ER 273, CA; on appeal on other grounds [1995] 2 AC 296, [1994] 3 All ER 129, HL.

5 *Horrocks v Lowe* [1975] AC 135 at 149, [1974] 1 All ER 662 at 669, HL, per Lord Diplock. As to express malice in defamation see PARA 149 et seq ante.

6 See note 5 supra.

7 *Cellactite and British Uralite Ltd v HH Robertson Co Inc* (1957) Times, 23 July, CA; applying *Shapiro v La Morta* (1923) 40 TLR 39; affd (1923) 40 TLR 201, CA.

8 *Halsey v Brotherhood* (1881) 19 ChD 386 at 388, CA, per Lord Coleridge CJ (there must be some evidence to satisfy the court or the jury that the statement was not only untrue, but was made in bad faith for the purpose of injuring the plaintiff and not in the genuine defence of the defendants' own property); *Burnett v Tak* (1882) 45 LT 743; *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 777, HL; *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at 99, HL; *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1904) 20 TLR 579, CA; and see the cases cited in PARA 283 notes 4-5 post. It does not matter whether the defendant's title is legal or equitable (*Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* supra at 90), and there is no distinction between the defence of a legal right under a patent and the defence of any other legal right (*Halsey v Brotherhood* supra; affg (1880) 15 ChD 514 at 518 per Jessel MR).

9 *Balden v Shorter* [1933] Ch 427; *London Ferro-Concrete Co Ltd v Justicz* (1951) 68 RPC 65; affd 68 RPC 261, CA.

10 *White v Mellin* [1895] AC 154 at 160, HL, per Lord Herschell C; *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1904) 20 TLR 579, CA.

11 *Clover v Royden* (1873) LR 17 Eq 190. See also PARA 283 note 5 post.

12 *Dicks v Brooks* (1880) 15 ChD 22 at 39-40, CA. See also the cases on slander of title cited in PARA 284 note 2 post. As to mistake generally see MISTAKE.

13 *White v Mellin* [1895] AC 154, HL; *Halsey v Brotherhood* (1880) 15 ChD 514 at 518. See also *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662, HL.

## UPDATE

### 282 Proof of malice in actions for malicious falsehood

NOTE 3--Although a statement may be thoroughly misleading and contain a number of false representations, this does not necessarily mean it is made maliciously: *Emaco Ltd v Dyson Appliances Ltd* (1999) Times, 8 February.

NOTE 8--See also *Assured Quality Construction Ltd v Thompson* [2006] All ER (D) 181 (Mar) (reasonableness of defendant's belief supported by receipt of legal advice that he had beneficial interest in property).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(3) MALICE/283. Malice in actions for slander of title.

### 283. Malice in actions for slander of title.

In an action for slander of title<sup>1</sup>, the onus is on the plaintiff to prove malice on the part of the defendant<sup>2</sup>.

Malice in this connection means a dominant improper motive<sup>3</sup>, and it is no evidence of malice if all that is shown is that the defendant wrote or spoke honestly, although wrongly, in defence of a supposed title to the property<sup>4</sup> or in the honest execution of a supposed duty<sup>5</sup>.

In judging the defendant's good faith, the question is not whether his belief was founded on such grounds as would persuade a person of sound sense and business knowledge, but whether in all the circumstances he acted in good faith considering his character and situation, prejudices and passions, for it is important that a person interested in the property has liberty to put forward his objections to the title<sup>6</sup>.

1 As to the nature of actions for slander of title see PARA 276 ante.

2 See notes to 1 *Wms Saund* (1871 Edn) 310; *Smith v Spooner* (1810) 3 Taunt 246; *Wren v Weild* (1869) LR 4 QB 730; *British Railway Traffic and Electric Co Ltd v CRC Co Ltd and London County Council* [1922] 2 KB 260; *Shapiro v La Motta* (1923) 130 LT 622, CA; *Farr v Weatherhead and Harding* (1932) 49 RPC 262; cf *Serville v Constance* [1954] 1 All ER 662, [1954] 1 WLR 487. In *Watson v Reynolds* (1826) Mood & M 1, evidence of the truth of the statements was admitted to disprove malice although there was no defence of justification. See also PARA 282 ante.

3 See PARA 282 ante, especially at notes 4-6.

4 *Gerard v Dickenson* (1590) 4 Co Rep 18a; *Davis v Gardiner* (1593) 4 Co Rep 16b at 17a; *Pennyman v Rabanks* (1595) Cro Eliz 427; *Lovett v Weller* (1616) 1 Roll Rep 409; *Smith v Spooner* (1810) 3 Taunt 246; *Carr v Duckett* (1860) 5 H & N 783; *Steward v Young* (1870) LR 5 CP 122. As to the cases on trade libel relating to this point see PARA 278 ante.

5 *Pater v Baker* (1847) 3 CB 831, where the plaintiff put up certain houses for sale, and a district surveyor announced that he would not allow the houses to be finished or occupied, and said he had power to stop certain buildings until the roads were made good, although in fact he had no power to stop the buildings; *Clover v Royden* (1873) LR 17 Eq 190, where the defendants, the officials of an underwriters' association which kept a register of vessels, placed opposite the name of the plaintiffs' vessel the words 'class suspended'; because the plaintiffs had made alterations of which the defendants genuinely disapproved, it was held that the defendants were justified in the absence of any proof of malice.

6 *Pitt v Donovan* (1813) 1 M & S 639 at 644-646, 648; see *Hargrave v Le Breton* (1769) 4 Burr 2422 at 2423.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(3) MALICE/284. Inference of malice.

## 284. Inference of malice.

The absence of reasonable and probable cause may, but does not necessarily, lead to the inference of malice<sup>1</sup>, but it is clearly evidence of malice if the defendant puts forward a claim which he in fact knows to be unfounded<sup>2</sup>. Malice may be inferred where the claim is made not in defence of the defendant's own title but in a matter in which the defendant is not interested<sup>3</sup>. The court should, however, be very slow to draw the inference of malice, unless it is satisfied that the defendant did not believe that his words were true, or was indifferent to their truth or falsity<sup>4</sup>.

1 *British Railway Traffic and Electric Co Ltd v CRC Co Ltd and London County Council* [1922] 2 KB 260 at 269 per McCardie J; *Pater v Baker* (1847) 3 CB 831 at 868 per Maule J; *Atkins v Perrin* (1862) 3 F & F 179, where the court was asked to decide as a question of fact (1) whether the defendant's belief was genuine; and (2) whether, if genuine, it was such as a reasonable person might hold. The defendant had alleged the existence of a will which might have thrown doubt on the plaintiff's title after he had been definitely told that no will existed and more than a year had elapsed since the death of the deceased. Cf *Watson v Reynolds* (1826) Mood & M 1 per Little Dale J; *Green v Button* (1835) 2 Cr M & R 707 at 715 per Parke B (action held maintainable 'though the defendant makes a claim of right, if it is made maliciously and without reasonable or probable cause and the special damage accrues from the claim so made'); and see PARA 274 note 4 ante.

2 *Gerard v Dickenson* (1590) 4 Co Rep 18a; *Atkins v Perrin* (1862) 3 F & F 179; see also *Mildmay's Case* (1584) 1 Co Rep 175a at 177b note (n). The mere fact that the defendant has been informed by the plaintiff that a bill of sale under which he claims the plaintiff's goods is invalid and the defendant, nevertheless, persists in his claim is not evidence of malice on his part (*Steward v Young* (1870) LR 5 CP 122); and it is no evidence of malice that an officer acting under complicated statutory legislation makes a mistake as to the law (*Pater v Baker* (1847) 3 CB 831 at 868, per Maule J), or that, having a proper motive, and being bound to select some person against whom to take action, he selects the plaintiff as the most influential person connected (*Pater v Baker* supra at 865 per Wilde CJ).

3 *Mildmay's Case* (1584) 1 Co Rep 175a at 177a; *Pennyman v Rabanks* (1595) Cro Eliz 427; *Earl of Northumberland v Byrt* (1607) Cro Jac 163; *Pitt v Donovan* (1813) 1 M & S 639 at 646, where the defendant had an interest in that he was the husband of a woman to whom the property might come; *Rowe v Roach* (1813) 1 M & S 304; and see *Johnson v Smith* (1584) Moore KB 187.

4 *Horrocks v Lowe* [1975] AC 135 at 150, [1974] 1 All ER 662 at 670, HL, per Lord Diplock.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(4) SPECIAL DAMAGE/285. Need for special damage.

## (4) SPECIAL DAMAGE

### 285. Need for special damage.

At common law special damage is essential to the cause of action<sup>1</sup>, but in an action for slander of title<sup>2</sup>, slander of goods<sup>3</sup> or other malicious falsehood<sup>4</sup>, it is not necessary to allege or prove special damage if (1) the words<sup>5</sup> on which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form<sup>6</sup>; or (2) the words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business<sup>7</sup> held or carried on by him at the time of publication<sup>8</sup>. However, a plaintiff will not normally recover substantial damages unless he can prove a probable pecuniary loss<sup>9</sup>.

In cases where actual damage must be alleged and proved, it must flow naturally and directly from the use of the words complained of<sup>10</sup>. There is no damage on which a claim can be sustained if the loss merely arises because the plaintiff is prevented from doing something which he is not legally entitled to do<sup>11</sup>. The ordinary principles of causation apply<sup>12</sup>.

Whether damages for anxiety and mental distress are recoverable in malicious falsehood, and whether they constitute special damage essential to the cause of action, remain open questions<sup>13</sup>. Damages for injury to reputation are not recoverable<sup>14</sup>.

1 At common law the damage done is said to be the gist of the action: see *Ratcliffe v Evans* [1892] 2 QB 524 at 532, CA (for a discussion of the different meanings of special damage see at 527-528; in the present case it means 'the actual and temporal loss which has occurred'); *Leetham v Rank* (1912) 57 Sol Jo 111, CA; *Evans v Harlow* (1844) 5 QB 624; *Dicks v Brooks* (1880) 15 ChD 22, CA; *Halsey v Brotherhood* (1881) 19 ChD 386 at 388, CA; *Hatchard v Mège* (1887) 18 QBD 771 at 775, DC; *White v Mellin* [1895] AC 154 at 161, HL, per Lord Herschell C; *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at 99, HL, per Lord Davey, at 101 per Lord James of Hereford ('specific money damage'), and at 103 per Lord Robertson (loss which can be and is specified'); it is uncertain whether a general decline of business is sufficient; cf para 286 note 2 post; *Barrett v Associated Newspapers Ltd* (1907) 23 TLR 666, CA (allegation that a house was haunted, but no evidence of special damage, the depreciation in the value of the house being due to similar previous allegations by others). See also *Griffiths v Benn* (1911) 27 TLR 346, CA (disparagement of system worked under patent), and the cases on slander of title cited in PARA 276 ante. See also PARA 281 ante. As to special damage in defamation see PARA 257 et seq ante.

2 As to the nature of actions for slander of title see PARA 276 ante.

3 As to the nature of actions for slander of goods see PARA 277 ante.

- 4 As to the nature of actions for malicious or injurious falsehood see PARA 274 ante.
- 5 For the meaning of 'words' see PARA 11 note 1 ante.
- 6 Defamation Act 1952 s 3(1)(a). The publication of words in the course of any programme included in a programme service is treated for these purposes as publication in permanent form (see the Broadcasting Act 1990 s 166(1), (2)); as is the publication of words in the course of a performance of a play (see the Theatres Act 1968 s 4(1), (2)). Section 4(1), (2) is subject to certain exceptions: see s 7 (as amended); and PARA 77 ante. For the meaning of 'programme' and 'programme service' see PARA 76 ante.
- 7 Cf the Defamation Act 1952 s 2; and PARA 57 ante.
- 8 Ibid s 3(1)(b).
- 9 *Fielding v Variety Inc* [1967] 2 QB 841, [1967] 2 All ER 497, CA; but see also *Joyce v Sengupta* [1993] 1 All ER 897 at 906, [1993] 1 WLR 337 at 347, CA. If a plaintiff relies on the Defamation Act 1952 s 3, he cannot introduce evidence of special damage without pleading it: *Calvet v Tomkies* [1963] 3 All ER 610 at 612, [1963] 1 WLR 1397 at 1399-1400, CA, per Lord Denning MR. See also PARA 19 ante.
- 10 *Miller v David* (1874) LR 9 CP 118 at 126; *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1903) 20 TLR 88; revsd (1904) 20 TLR 579, CA. See also *Lynch v Knight* (1861) 9 HL Cas 577 at 600 per Lord Wensleydale, cited with approval in *Chamberlain v Boyd* (1883) 11 QBD 407 at 414, CA, per Brett LJ. As to remoteness of damage see DAMAGES vol 12(1) (Reissue) PARA 851 et seq.
- 11 *Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95, HL.
- 12 See eg *Brady v Express Newspapers* [1994] TLR 690, in which a life prisoner's claim for loss of privileges was struck out, since he would not lose them without an intervening quasi-judicial inquiry into the newspaper's allegations.
- 13 *Joyce v Sengupta* [1993] 1 All ER 897, [1993] 1 WLR 337, CA.
- 14 *Joyce v Sengupta* [1993] 1 All ER 897 at 907, [1993] 1 WLR 337 at 347-348, CA.

## UPDATE

### 285 Need for special damage

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES--*Joyce v Sengupta*, cited, considered in *Khodaparast v Shad* [2000] 1 All ER 545, [2000] 1 WLR 618, CA (aggravated damages for injury to feelings could be awarded in an appropriate case).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(4) SPECIAL DAMAGE/286. Proof of damage.

### 286. Proof of damage.

In cases where it is still necessary to allege and prove special damage<sup>1</sup>, the damage must be alleged and proved with such certainty and particularity as are reasonable having regard to the circumstances. Sometimes a general loss is the natural and direct result of the words, and particular instances of loss cannot from the nature of the case be specified<sup>2</sup>, but where the statement complained of is not intended, or reasonably likely, to produce, and does not in the ordinary course of things produce, a general loss of business<sup>3</sup>, as distinct from the loss of particular known customers, the plaintiff must prove actual loss of customers<sup>4</sup>.

1 As to the cases where it is still necessary to allege and prove special damage see PARAS 276 text and note 11, 285 ante.

2 *Ratcliffe v Evans* [1892] 2 QB 524 at 531-532, CA (where evidence of general loss of business was held admissible); *Riding v Smith* (1876) 1 Ex D 91 (where a general loss of business was held to give a cause of action when the wife of the plaintiff, a trader, was charged with adultery on the premises; but as to this case see PARA 274 note 4 ante; *Ratcliffe v Evans* supra at 534); *Dicks v Brooks* (1880) 15 ChD 22, CA (there must be a 'sensible, appreciable damage'); *Hatchard v Mège* (1887) 18 QBD 771, DC (allegation that the plaintiff was greatly injured in his trade held sufficient); see also *Iveson v Moore* (1699) 1 Ld Raym 486; *Evans v Harries* (1856) 1 H & N 251 at 254 per Martin B; *Worsley & Co Ltd v Cooper* [1939] 1 All ER 290 (general loss). Cf *Evans v Harlow* (1844) 5 QB 624 at 633; *Lyne v Nicholls* (1906) 23 TLR 86 (reflection on newspaper's circulation), where special damage was not sufficiently shown. In *Alcott v Millar's Karri and Jarrah Forests Ltd* (1904) 91 LT 722, CA, there was held to be sufficient evidence of special damage where the words were contained in a letter written to a road authority which was about to enter into a contract, and the plaintiff in consequence had to reduce his price and allow special terms, although a circular which might have contributed to that result was also before the authority, and there was public agitation on the subject. See also *Dicks v Brooks* (1880) 15 ChD 22, CA; and PARAS 183-185 ante; and see *Joyce v Sengupta* [1993] 1 All ER 897, [1993] 1 WLR 337, CA.

3 *Ratcliffe v Evans* [1892] 2 QB 524, CA.

4 *Leatham v Rank* (1912) 57 Sol Jo 111, CA.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/4. MALICIOUS FALSEHOOD/(5) INJUNCTIONS/287. Grant of an injunction.

## (5) INJUNCTIONS

### 287. Grant of an injunction.

Apart from cases in which it is no longer necessary to allege or prove special damage<sup>1</sup>, a final injunction will not usually be granted where special damage is not alleged and proved<sup>2</sup>, for an injunction will not be granted where no actionable wrong is shown<sup>3</sup>. An exception may be made where the words are clearly false<sup>4</sup> and malicious, or where disparagement is clearly made out, if it appears that damage will necessarily arise from any publication intended by the defendants<sup>5</sup>.

An interlocutory injunction will not be granted in malicious falsehood, as in defamation, if the defendant asserts that his words were true or puts forward some other recognised defence, unless the court is satisfied at the interlocutory stage that the plaintiff's claim is bound to succeed<sup>6</sup>.

1 As to the cases where it is no longer necessary to allege or prove special damage see PARA 285 ante.

2 As to alleging and proving special damage see PARAS 281, 286 ante. As to special damage generally see PARAS 257-259 ante. See, however, *Thomas v Williams* (1880) 14 ChD 864, where a final injunction was granted without proof of special damage; *Thorley's Cattle Food Co v Massam* (1877) 6 ChD 582, where an interlocutory injunction was refused, and (1880) 14 ChD 763, CA, where a final injunction was granted on the basis that the words complained of were a libel in the ordinary sense; cited in *Thomas v Williams* supra. As to injunctions see PARAS 170-174, 271-273 ante. As to threats of patent infringement proceedings see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 557 et seq.

3 *White v Mellin* [1895] AC 154 at 162, 163, HL, per Lord Herschell C, at 167 per Lord Watson, and at 170 per Lord Morris; *Canham v Jones* (1813) 2 Ves & B 218; *Halsey v Brotherhood* (1881) 19 ChD 386 at 386, CA, per Lord Coleridge CJ; *Lee v Gibbings* (1892) 67 LT 263.

4 On a motion for an interlocutory injunction the onus is on the plaintiff to satisfy the court as to the falsehood: *Anderson v Liebig's Extract of Meat Co Ltd* (1881) 45 LT 757; *Burnett v Tak* (1882) 45 LT 743. The same rule seems to apply at the trial of the action: see *Hatchard v Mège* (1887) 18 QBD 771 at 775, DC.

5 The court will restrain the issue of misleading trade circulars: *Harper v Pearson* (1860) 3 LT 547; *Stevens v Paine* (1868) 18 LT 600; and see *London Ferro-Concrete Co Ltd v Justicz* (1951) 68 RPC 65; affd 68 RPC 261, CA (liberty to apply for injunction to restrain repetition granted); but see *British Railway Traffic and Electric Co Ltd v CRC Co Ltd and London County Council* [1922] 2 KB 260 (order refused). See also *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot* (1903) 20 TLR 88; revsd (1904) 20 TLR 579, CA (distinguishing *White v Mellin* [1895] AC 154, HL, on the ground that in that case there was no evidence that the words were false or false to the defendant's knowledge or calculated to cause damage); *Burnett v Tak* (1882) 45 LT 743 (where an interlocutory injunction was refused because the plaintiff failed to prove the statements false; see at 744 per Kay J, explaining *Halsey v Brotherhood* (1880) 15 ChD 514 at 520 per Jessel MR); *Anderson v Liebig's Extract of Meat Co Ltd* (1881) 45 LT 757 (where it was recognised that an injunction would be granted where statements are made with reference to the infringement of a patent or the invasion of a trade mark and the like, if it is proved that they are untrue, but an interlocutory injunction was refused for want of such proof); *Kerr v Gandy* (1886) 3 TLR 75 (order made: advertisement against another's goods); *Hayward & Co v Hayward & Sons* (1886) 34 ChD 198 (order made, where the circular complained of contained an untrue statement of the effect of the judgments in a former action and was a trade libel); *Spalding & Bros v AW Gamage Ltd* (1915) 84 LJ Ch 449, HL; and as to trade libel and slander of title generally see PARAS 276, 278 ante. As to restraining publication of a libel see PARA 271 ante. As to the granting of an injunction against the circulation of libellous statements injurious to property see *Dixon v Holden* (1869) LR 7 Eq 488, commented on in *Mulkern v Ward* (1872) LR 13 Eq 619. As to granting an injunction against the circulation of untrue statements calculated to injure property where the statements were also a breach of duty under an agreement see *Ward v Beeton* (1874) LR 19 Eq 207 at 215.

6 See *Bestobell Paints Ltd v Bigg* [1975] FSR 421, 119 Sol Jo 678. For the exception, in defamation and malicious falsehood cases, to the general rule in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL, see PARA 171 note 4 ante.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(1) DEFAMATORY LIBELS AND THEIR PUNISHMENT/288. Defamatory libel.

## 5. CRIMINAL PROCEEDINGS

### (1) DEFAMATORY LIBELS AND THEIR PUNISHMENT

#### 288. Defamatory libel.

The publication of a defamatory libel<sup>1</sup> is both a civil wrong and a common law offence<sup>2</sup>, although criminal prosecutions are now very rare<sup>3</sup>. Civil proceedings may only be instituted where there has been publication to a third person<sup>4</sup>. In criminal proceedings, publication to the defamed person alone is sufficient<sup>5</sup> because of the tendency of the libel to cause a breach of the peace. It is for this reason that libel was generally considered to be a crime<sup>6</sup>. However, although it is a factor to be taken into consideration<sup>7</sup>, the prosecution does not have to prove that the libel did or was likely to cause a breach of the peace<sup>8</sup>.

Criminal proceedings may be instituted where the publication is likely to disturb the peace or seriously to affect the defamed person's reputation<sup>9</sup>, but where the libel is of so trivial a character as to make that unlikely, no prosecution should be brought<sup>10</sup>. No proceedings for criminal libel will lie where the defamatory words are spoken, although the defendant may be bound over to be of good behaviour in appropriate cases<sup>11</sup>.

Punishment for the offence is laid down by statute, the severity of the punishment depending on whether or not the defendant knew that the words were false<sup>12</sup>.

1 The term 'defamatory libel' is generally used in criminal law to distinguish this type of libel from obscene, seditious or blasphemous libel, as to which see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 370, 372; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARAS 753, 826.

2 As to the distinctions between civil and criminal libel generally see PARA 14 ante.



3 Serious doubts have been expressed as to whether the present English law of criminal libel is consistent with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 10.2: see *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL, per Lords Diplock and Keith.

4 As to publication to a third person see PARA 61 ante. As to publication in libel actions generally see PARA 60 et seq ante. For the purposes of the law of criminal libel so far as it relates to the publication of defamatory matter, the publication of words in the course of any programme included in a programme service is treated as publication in permanent form (Broadcasting Act 1990 s 166(1)); as is the publication of words in the course of the performance of a play (Theatres Act 1968 s 4(1)). Section 4(1) is subject to certain exceptions: see s 7 (as amended); and PARA 77 ante. For the meaning of 'programme' and 'programme service' see PARA 76 ante.

5 As to publication to the plaintiff alone in criminal proceedings see PARAS 5, 60 ante.

6 'In a criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace, is the whole that the law considers': 4 Bl Com (14th Edn) 150-151. See also *Hicks' Case* (1618) Hob 215; *R v Summers* (1665) 1 Lev 139; *R v Saunders* (1670) T Raym 201; *R v Holbrook* (1878) 4 QBD 42 at 46, DC, per Lush J; *R v Labouchere* (1884) 12 QBD 320 at 322; *Goldsmith v Pressdram Ltd* [1977] QB 83 at 90-91, [1977] 2 All ER 557 at 564, quoting words of Lord Coleridge and Lord Alverstone CJ.

7 *Goldsmith v Pressdram Ltd* [1977] QB 83 at 91, [1977] 2 All ER 557 at 564-565 per Wien J.

8 *R v Wicks* [1936] 1 All ER 384 at 386-387, CCA, per du Parcq J; *Thorley v Lord Kerry* (1812) 4 Taunt 355 at 364 per Lord Mansfield CJ; *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL.

9 *R v Wicks* [1936] 1 All ER 384, CCA; *Goldsmith v Pressdram Ltd* [1977] QB 83, [1977] 2 All ER 557; *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 at 571, [1977] 1 WLR 478 at 485, CA.

10 *R v Labouchere* (1884) 12 QBD 320; *R v Wicks* [1936] 1 All ER 384 at 386; *Goldsmith v Pressdram Ltd* [1977] QB 83, [1977] 2 All ER 557; *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566, [1977] 1 WLR 478 CA; and see *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL.

11 1 Hawk PC c 28, 1-3. See also *R v Skinner* (1772) Lofft 54 (words spoken by a justice to a grand jury).

12 See the Libel Act 1843 ss 4, 5, and PARAS 289-290 post.

## UPDATE

### 288 Defamatory libel

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(1) DEFAMATORY LIBELS AND THEIR PUNISHMENT/289. Punishment for publication of defamatory libel.

### 289. Punishment for publication of defamatory libel.

Any person<sup>1</sup> who maliciously<sup>2</sup> publishes<sup>3</sup> any defamatory libel<sup>4</sup> is liable on conviction to a fine<sup>5</sup>, or up to one year's imprisonment<sup>6</sup>, or both, as the court may award<sup>7</sup>. In addition to imposing a custodial sentence, the court may order the defendant to find sureties to keep the peace for a reasonable period and his failure to do so may result in further imprisonment for that period<sup>8</sup>.

1 Including a corporation which may be fined: see PARAS 34, 71 ante; and CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1280-1281. As to companies see COMPANIES vol 14 (2009) PARA 312 et seq. As to directors see *R v Allison* (1888) 59 LT 933, CCR; *R v Love* (1955) 39 Cr App Rep 30, CCA. As to the criminal capacity of corporations see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 38. As to newspapers see PARA 293 post.

2 Malice is not an essential ingredient at common law: see *R v Munslow* [1895] 1 QB 758 at 761, CCR, per Lord Russell of Killowen CJ. As to implied malice see PARAS 16, 110, 137 ante. As to express malice see PARA 149 et seq ante. As to defences see PARAS 296-300 post.

3 As to publication see PARA 60 et seq, 288 note 4 ante. To support a criminal prosecution the publication need not be to a third person: see PARA 60 ante. As to the mitigation of the rule *respondeat superior* in the case of a criminal prosecution for a libel see the Libel Act 1843 s 7; and PARA 300 post; see also PARA 60 ante; and AGENCY vol 1 (2008) PARA 155.

4 As to what is a defamatory libel see PARAS 5, 14, 288 ante. As to a libel on a dead person see PARAS 6, 29 ante. As to libels on a class see PARA 7 ante. As to the special procedure in the case of libels in newspapers see PARA 293 post.

5 As to fines and recognisances to keep the peace see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 et seq.

6 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 et seq.

7 Libel Act 1843 s 5.

8 *R v Trueman* [1913] 3 KB 164, CCA, where the defendant was sentenced to 12 months' imprisonment and ordered to find sureties to keep the peace for 12 months.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(1) DEFAMATORY LIBELS AND THEIR PUNISHMENT/290. Punishment for publication of defamatory libel known to be false.

## **290. Punishment for publication of defamatory libel known to be false.**

Any person who maliciously<sup>1</sup> publishes any defamatory libel<sup>2</sup>, knowing it to be false, is liable on conviction to imprisonment for a term not exceeding two years, and to pay such fine as the court may award<sup>3</sup>. The onus is on the prosecution to prove that the defendant knew that the libel was false, but the falsity is presumed unless and until the defendant raises a plea of justification<sup>4</sup>. Knowledge may be inferred on proof that the defendant had the means of knowledge<sup>5</sup>. On an indictment for publishing a defamatory libel knowing it to be false, the court may acquit the defendant of the statutory portion of the charge<sup>6</sup> and convict him of the residue<sup>7</sup>.

1 See PARA 289 note 2 ante.

2 As to publication of a defamatory libel see 288 note 4 ante.

3 Libel Act 1843 s 4 (amended by virtue of the Criminal Justice Act 1948 s 1(2)).

4 *R v Wicks* [1936] 1 All ER 384 at 387, CCA. Truth alone is no defence to a criminal prosecution: see PARA 296 post.

5 *R v Wicks* [1936] 1 All ER 384 at 387-388, CCA.

6 Ie the offence under the Libel Act 1843 s 4 (as amended).

7 Ie the offence now covered by ibid s 5 (see PARA 289 ante): *Boaler v R* (1888) 21 QBD 284.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(1) DEFAMATORY LIBELS AND THEIR PUNISHMENT/291. Libel on a foreign ambassador.

## **291. Libel on a foreign ambassador.**

A libel on a foreign ambassador is a common law offence punishable as tending to interrupt the peaceful relations between this country and the country which he represents<sup>1</sup>.

1 *R v D'Eon* (1764) 1 Wm Bl 510 at 517; see also *R v Peltier* (1803) 28 State Tr 529 at 617.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(1) DEFAMATORY LIBELS AND THEIR PUNISHMENT/292. Blackmail.

## **292. Blackmail.**

Any person who publishes or threatens to publish any libel on any living or dead person may be guilty of the offence of blackmail<sup>1</sup>.

1 As to the offence of blackmail see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 308.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(i) Publication in Newspapers/293. Leave to prosecute publication in newspaper.

## **(2) PROSECUTION**

### **(i) Publication in Newspapers**

#### **293. Leave to prosecute publication in newspaper.**

No criminal prosecution may be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper<sup>1</sup>, for any libel published in it, without the order of a judge in chambers<sup>2</sup>. The application for such an order must be made on notice to the person accused, who must have an opportunity of being heard<sup>3</sup>. Leave will only be granted where there is a *prima facie* case, where the libel is so serious that the criminal law ought to be invoked and where the public interest requires the institution of criminal proceedings<sup>4</sup>. On such an application, the judge may take into account all the circumstances, for example the strength of a proposed defence of justification, and not merely the evidence put forward by the defendant<sup>5</sup>.

No appeal lies from the judge's order allowing or refusing leave to prosecute<sup>6</sup>.

1 'Newspaper' means any paper containing public news, intelligence or occurrences, or any remarks or observations in it printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding 26 days between the publication of any two such papers, parts or numbers, and any paper printed in order to be dispersed and made public weekly or more frequently, or at intervals not exceeding 26 days, containing only or principally advertisements: Newspaper Libel and Registration Act 1881 s 1; applied by the Law of Libel Amendment Act 1888 s 1.

2 Ibid s 8. The order must be made by a judge not a master: RSC Ord 32 r 11(1)(a). This restriction does not apply to a prosecution under the Criminal Procedure and Investigations Act 1996 s 60 (restriction on reporting certain derogatory remarks: see PARA 303 post).

3 Law of Libel Amendment Act 1888 s 8; see also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1071.

4 *Goldsmith v Pressdram Ltd* [1977] QB 83, [1977] 2 All ER 557.

5 *Desmond v Thorne* [1982] 3 All ER 268, [1983] 1 WLR 163.

6 Supreme Court Act 1981 s 18(1)(a). See also *Ex p Pulbrook* [1892] 1 QB 86, DC; *Goldsmith v Pressdram Ltd* [1977] QB 83 at 88, [1977] 2 All ER 557 at 562; and CIVIL PROCEDURE.

## UPDATE

### 293 Leave to prosecute publication in newspaper

NOTE 1--See *Gleaves v Insall*; *Dore v Insall*; *Bolton v Install* [1999] EMLR 779 (newspaper journalist not 'responsible for the publication of a newspaper' within meaning of 1888 Act s 8).

TEXT AND NOTE 2--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 3--It is an abuse of process to lay an information without informing the magistrate that the same complaint has previously been dismissed by another magistrate: *Gleaves v Insall*; *Dore v Insall*; *Bolton v Install*, NOTE 1.

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(i) Publication in Newspapers/294. Committal proceedings.

### 294. Committal proceedings.

As from the date at which the amended procedure for committals was introduced by virtue of the Criminal Procedure and Investigations Act 1996<sup>1</sup>, the only evidence admissible at committals is documentary and exhibit evidence tendered by the prosecution<sup>2</sup>. Under the previous procedure, at committal proceedings for the offence of criminal libel a magistrate had no jurisdiction to receive evidence of the complainant's general bad reputation<sup>3</sup> and no jurisdiction to hear evidence in support of a defence of justification<sup>4</sup>. On the hearing of a charge against a proprietor<sup>5</sup>, publisher or editor, or any person responsible for the publication of a newspaper<sup>6</sup>, for a libel published in it, a magistrates' court<sup>7</sup> could, however, receive evidence as to the publication being for the public benefit, as to the matters charged in the libel being true<sup>8</sup>, as to the report being fair and accurate and published without malice<sup>9</sup> and as to any matter which under any Act or otherwise might be given in evidence by way of defence by the person charged on his trial on indictment. If in the court's opinion, after hearing the evidence, there was a strong or probable presumption that the trial jury would acquit the person charged, the court could dismiss the charge<sup>10</sup>.

1 See the Magistrates' Courts Act 1980 ss 5A-5F (added by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 3); and MAGISTRATES. The Criminal Procedure and Investigations Act 1996 Sch 1 has effect in relation to any alleged offence in relation to which Pt I (ss 1-20) (disclosure) applies with effect from 1 April 1997 and thus applies as from that date where a person is charged with criminal libel and committed for trial:

see s 1; the Criminal Procedure and Investigations Act 1996 (Appointed Day No 3) Order 1997, SI 1997/682; and the Criminal Procedure and Investigations Act 1996 (Commencement) (Section 65 and Schedules 1 and 2) Order 1997, SI 1997/683.

2 See note 1 *supra*.

3 *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL.

4 *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL. As to the defence of justification in criminal libel see the Libel Act 1843 s 6; and PARA 296 post.

5 'Proprietor' means the sole proprietor of a newspaper or, in the case of a divided proprietorship, the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in the same way representing or responsible for the other shares or interests in it, and no other person: Newspaper Libel and Registration Act 1881 s 1.

6 For the meaning of 'newspaper' see PARA 293 note 1 *ante*.

7 As to magistrates' courts see the Magistrates' Courts Act 1980; and MAGISTRATES.

8 Truth, by itself, is no defence to a prosecution for criminal libel: see PARA 296 post; and *R v Carden* (1879) 5 QBD 1, DC. Publication of a report of charges against a company's officers is not for the public benefit: see *Ponsford v Financial Times Ltd and Hart* (1900) 16 TLR 248. As to libels published with knowledge that they were false see PARA 290 *ante*.

9 As to fair and accurate reports in newspapers see PARA 299 post.

10 Newspaper Libel and Registration Act 1881 s 4. As from the date at which the Magistrates' Courts Act 1980 ss 5A-5F (as added) came into force, however, defence evidence may no longer be presented at a committal: see notes 1-2 *supra*; and MAGISTRATES.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(i) Publication in Newspapers/295. Indictment.

## 295. Indictment.

Prosecution of a defamatory libel is by indictment<sup>1</sup>. Generally, there is no difference in substance between the pleading in a statement of claim and an indictment for libel<sup>2</sup>. As it is necessary in actions for libel or slander to set out the actual words complained of in the statement of claim with proper innuendoes, so also is it necessary in an indictment where words are of the essence of the offence<sup>3</sup>.

1 As to indictments see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1202 et seq.

2 As to the form of indictment see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1210 et seq. As to the possible need of greater stringency in framing an indictment than in pleading a statement of claim in libel see *Bradlaugh v R* (1878) 3 QBD 607, CA, and the cases cited there and in PARA 176 note 1 *ante*. Although *Bradlaugh v R* *supra* is no longer an authority as to obscene libels, it is an authority as to other libels. As to the trial of indictments see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1232 et seq. As to the general rules of evidence see CIVIL PROCEDURE vol 11 (2009) PARA 752 et seq; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1359 et seq; and as to the burden of proof in criminal cases see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1368-1373. As to appeals see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 1837 et seq.

3 See note 2 *supra*.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(ii) Defences to the Indictment/296. Justification and public benefit.

## **(ii) Defences to the Indictment**

### **296. Justification and public benefit.**

On the trial of any indictment for a defamatory libel, in addition to the regular plea of not guilty, the defendant may enter a special plea that the alleged defamatory matter is true, and that its publication is for the public benefit<sup>1</sup>. The plea of truth follows the style and manner of a plea of justification in a civil action for defamation<sup>2</sup>. However, in addition to the plea of truth, without which the truth of the matter charged may not be inquired into<sup>3</sup>, the defendant must further allege that it was for the public benefit that the defamatory matter charged should be published, and must state the particular fact or facts by reason of which he maintains that the publication of the matter charged was for the public benefit<sup>4</sup>. Thus, truth alone is no answer to the charge.

To this special plea of truth and public benefit the prosecution is at liberty to enter a replication or reply<sup>5</sup>. Where in criminal proceedings the person defamed is a rehabilitated person<sup>6</sup> and the defendant seeks to rely in his plea of justification on a spent conviction, there is no provision for entering in the criminal proceedings a reply alleging that the publication was made with malice<sup>7</sup>. The merits of a proposed plea of justification may not be taken into account by a magistrate at committal proceedings<sup>8</sup> but they may be considered, together with any other relevant circumstances, by a judge considering an application for leave to prosecute a newspaper for criminal libel<sup>9</sup>.

If on a plea of justification and public benefit the defendant is convicted, in passing sentence the court may consider whether the accused's guilt has been aggravated or mitigated by the special plea or by the evidence given to prove or to disprove it<sup>10</sup>.

These provisions do not take away or prejudice any defence under the plea of not guilty which it is competent to the defendant to make under such a plea to any indictment or information for libel<sup>11</sup>.

1 See the Libel Act 1843 s 6; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1269. The Defamation Act 1952 s 5, which concerns the defence of justification in civil actions (see PARA 86 note 3 ante), does not apply in criminal libel: s 17(2).

2 As to the manner of pleading in civil actions see PARA 175 et seq ante.

3 See the Libel Act 1843 s 6 and proviso; *R v Wicks* [1936] 1 All ER 384 at 387, CCA; *R v Newman* (1853) 1 E & B 558 at 569 (truth could not be given in evidence under a plea of not guilty); *R v Carden* (1879) 5 QBD 1 at 6, DC; and see PARA 290 ante.

4 Libel Act 1843 s 6. Where no plea of justification was pleaded, but the judge after the close of the case for the defence put to witnesses questions which might have suggested to the jury that the issue was whether the words complained of were true, the conviction was quashed: *R v McMahon* (1933) 24 Cr App Rep 95, CCA.

5 Where no replication has been filed, the accused is not entitled to be acquitted on the ground that the justification has not been traversed: *R v Seham Yousry* (1914) 84 LJBK 1272, CCA.

6 For the meaning of 'rehabilitated person' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 661.

7 The Rehabilitation of Offenders Act 1974 s 8 (as amended) (see PARA 92 ante), applies only to civil actions for defamation. As to proof of malice see s 8(5); and PARA 92 ante.

8 *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL. See, however para 294 notes 1-2, 10 ante.

9 *Desmond v Thorne* [1982] 3 All ER 268, [1983] 1 WLR 163. As to the prosecution of newspapers see PARA 293 ante.

10 Libel Act 1843 s 6.

11 *Ibid* s 6 proviso.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(ii) Defences to the Indictment/297. Fair comment.

### 297. Fair comment.

The defence of fair comment may be raised in answer to a criminal prosecution for libel<sup>1</sup>. It seems that if the defence is to be raised it must be raised by formal plea<sup>2</sup> and must presumably state the matter of public interest and the facts and matters relied on to support the comment, as in civil actions<sup>3</sup>.

1 *R v Flowers* (1879) 44 JP 377, DC; *R v Newman* (1853) 1 E & B 558 at 569; *R v Carden* (1879) 5 QBD 1 at 8, 14, DC. See also *R v White* (1808) 1 Camp 359n. However, there appears to be no reported decision where the defence was successful. See also *Goldsmith v Pressdram Ltd* [1977] QB 83 at 90, [1977] 2 All ER 557 at 563. The Defamation Act 1952 s 6, which concerns the defence of fair comment in civil actions (see PARA 140 ante), does not apply in criminal libel: s 17(2).

2 See eg *R v Newman* (1853) 1 E & B 558 at 569; and the cases cited in note 1 supra.

3 See Duncan and Neill on Defamation (2nd Edn, 1983) PARA 20.12.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(ii) Defences to the Indictment/298. Privilege.

### 298. Privilege.

At common law, the defences of absolute and qualified privilege are the same in criminal libel proceedings as in civil actions<sup>1</sup>. However, the statutory protection afforded to certain newspaper reports by the Defamation Act 1996<sup>2</sup> does not apply to criminal libel<sup>3</sup>.

1 *R v Munslow* [1895] 1 QB 758 at 761. See also *R v Wicks* [1936] 1 All ER 384, CCA (statement not privileged); *R v Rule* [1937] 2 KB 375, [1937] 2 All ER 772, CCA (occasion privileged); *R v Fitch* (1897) 61 JP 233; *R v Skinner* (1772) Lofft 54.

2 See the Defamation Act 1996 ss 14, 15, Sch 1; and PARAS 131-133 ante. At the date at which this volume states the law, ss 14-15, Sch 1 had not been brought into force.

3 *Ibid* s 20(2). As to those reports which are privileged see PARA 299 post.

## UPDATE

### 298 Privilege

NOTE 2--1996 Act ss 14, 15, Sch 1 in force 1 April 1999: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(ii) Defences to the Indictment/299. Statutory privilege of newspaper and broadcast reports.

## **299. Statutory privilege of newspaper and broadcast reports.**

The statutory defences of privilege in criminal libel still appear to be governed by the relevant provisions<sup>1</sup> of the Law of Libel Amendment Act 1888<sup>2</sup>.

A fair and accurate report published contemporaneously<sup>3</sup> in any newspaper<sup>4</sup> of proceedings publicly heard before any court exercising judicial authority is absolutely privileged<sup>5</sup>. A qualified privilege<sup>6</sup> attaches to a fair and accurate report in any newspaper of the proceedings of a public meeting, or the public proceedings of a local authority, a committee thereof, any commissioners lawfully appointed, select committees of the Houses of Parliament, and notices issued for the information of the public by the government or the police<sup>7</sup>. This privilege is lost if the newspaper refuses to publish a reasonable statement in explanation or contradiction<sup>8</sup>.

Neither privilege applies to blasphemous or indecent matter<sup>9</sup>.

1    I.e. the Law of Libel Amendment Act 1888 ss 3, 4 (repealed without affecting the criminal law): see the text and notes 4-9 infra.

2    Neither the Defamation Act 1952 nor the Defamation Act 1996 has any application to criminal libel: see the Defamation Act 1952 s 17(2); the Defamation Act 1996 s 20(2). See also Duncan and Neill on Defamation (2nd Edn, 1983) PARA 20.13.

3    For these purposes, a report of proceedings is treated as published contemporaneously: (1) in the case of a report of which publication is postponed pursuant to an order under the Contempt of Court Act 1981 s 4(2), if published as soon as practicable after that order expires; and (2) in the case of a report of committal proceedings of which publication is permitted by virtue only of the Magistrates' Courts Act 1980 s 8(3), if published as soon as practicable after publication is so permitted: Contempt of Court Act 1981 s 4(3). See further CONTEMPT OF COURT.

4    For the meaning of 'newspaper' see PARA 293 note 1 ante. These provisions also apply in relation to reports or matters included in a programme service, and in relation to any inclusion in such a service of any such report or matter, as it applies in relation to reports and matters published in a newspaper and to publication in a newspaper: Broadcasting Act 1990 s 203(1), Sch 20 para 2. For the meaning of 'programme service' see PARA 76 ante.

5    Law of Libel Amendment Act 1888 s 3 (repealed by the Defamation Act 1996 s 16, Sch 2, but without affecting the law relating to criminal libel: see s 20(2)). As to the absolute nature of this privilege see *Farmer v Hyde* [1937] 1 KB 728, [1937] 1 All ER 773, CA; *McCarey v Associated Newspapers Ltd* [1964] 2 All ER 335n, [1964] 1 WLR 855; revsd on appeal on quantum of damages only [1965] 2 QB 86, [1964] 3 All ER 947, CA. The privilege is not affected by the Criminal Procedure and Investigations Act 1996 ss 58-61 (restrictions on the reporting of certain derogatory assertions): see PARA 302 post.

6    I.e. rebuttable on proof of express malice: see PARA 149 et seq ante.

7    Law of Libel Amendment Act 1888 s 4 (repealed by the Defamation Act 1952 s 18(3), but without affecting the law relating to criminal libel: see s 17(2)). As to public meetings see *Ponsford v Financial Times Ltd and Hart* (1900) 16 TLR 248 per Mathew J (a meeting of company shareholders is a public meeting).

8    Law of Libel Amendment Act 1888 s 4 (as repealed: see note 7 supra).

9    Ibid s 3 proviso; s 4 (as repealed: see notes 5, 7 supra). As to blasphemous and obscene libel see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARAS 753, 826.

## **UPDATE**

## **299 Statutory privilege of newspaper and broadcast reports**



TEXT AND NOTE 9--The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished and accordingly the Law of Libel Amendment Act 1888 ss 3, 4 amended: Criminal Justice and Immigration Act 2008 s 79, Sch 28 Pt 5.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(2) PROSECUTION/(ii) Defences to the Indictment/300. Publication by agent.

### **300. Publication by agent.**

On the trial of any indictment for the publication of a libel, under a not guilty plea, when evidence has been given which establishes a presumptive case of publication against the defendant by the act of any other person by his authority, it is competent to the defendant to prove that the publication was made without this authority, consent or knowledge, and that it did not arise from want of due care or caution on his part<sup>1</sup>.

1 Libel Act 1843 s 7. As to the proprietor's responsibility for publication see PARA 69 ante.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/5. CRIMINAL PROCEEDINGS/(3) TRIAL/301. Functions of judge and jury.

## **(3) TRIAL**

### **301. Functions of judge and jury.**

The trial of an indictment for criminal libel is in the Crown Court before a High Court judge, circuit judge or recorder<sup>1</sup>. The jury may give a general verdict of guilty or not guilty on the whole matter put in issue on the indictment, and must not be required or directed by the court or judge before whom the indictment is tried to find the defendant guilty merely on the proof of the publication by him of the paper charged to be a libel, and of the sense ascribed to it in the indictment<sup>2</sup>.

However, the court or judge before whom the indictment is tried must, according to its or his discretion, give its or his opinion and directions to the jury on the matter in issue in the same way as in other criminal cases<sup>3</sup>; and nothing in the Libel Act 1792 may extend or be construed to extend to prevent the jury from finding a special verdict, in its discretion, as in other criminal cases<sup>4</sup>. If the jury finds the defendant guilty it is lawful for him to move in arrest of judgment on such ground and in such manner as he might have done at common law<sup>5</sup>.

Both in actions and prosecutions for libel the judge may withdraw the case from the jury if in his opinion the matter charged properly construed is not reasonably capable of a defamatory meaning. The jury may always find a general verdict for the defendant, even if in the judge's opinion the words are so capable and indeed are defamatory; so that if the defendant can persuade either the court or the jury to be in his favour, he succeeds<sup>6</sup>.

1 See the Supreme Court Act 1981 s 75(1); and *Practice Note* [1987] 3 All ER 1064, [1987] 1 WLR 1671, CA.

2 Libel Act 1792 s 1.

3 Ibid s 2. As to a judge's summing up see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARAS 1319-1323. As to the functions of judge and jury see PARA 238 et seq ante.

4 Ibid s 3. As to special verdicts see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1339.

5 Ibid s 4. As to arrest of judgment see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1349.

6 *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 776, HL, per Lord Blackburn.

## UPDATE

### 301 Functions of judge and jury

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604). *Practice Note* [1987] 3 All ER 1064 replaced: see now *Practice Note* [2001] 4 All ER 635.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/6. STATUTORY RESTRICTIONS ON REPORTING OF CERTAIN DEROGATORY ASSERTIONS/302. Orders in respect of certain assertions.

## 6. STATUTORY RESTRICTIONS ON REPORTING OF CERTAIN DEROGATORY ASSERTIONS

### 302. Orders in respect of certain assertions.

The following provisions apply where:

128 (1) a person has been convicted of an offence<sup>1</sup> and a speech in mitigation is made by him or on his behalf before:

17

24. (a) a court determining what sentence should be passed on him in respect of the offence, or

25. (b) a magistrates' court determining whether he should be committed to the Crown Court for sentence<sup>2</sup>;

18

129 (2) a sentence has been passed on a person in respect of an offence and a submission relating to the sentence is made by him or on his behalf before:

19

26. (a) a court hearing an appeal against or reviewing the sentence, or

27. (b) a court determining whether to grant leave to appeal against the sentence<sup>3</sup>.

20

Where there are substantial grounds for believing that an assertion forming part of the speech or submission is derogatory to a person's character (for instance, because it suggests that his conduct is or has been criminal, immoral or improper), and that the assertion is false or that the facts asserted are irrelevant to the sentence, the court may make a reporting restriction order<sup>4</sup> in relation to the assertion<sup>5</sup> after it has made a determination with regard to sentencing<sup>6</sup>, but only if it is made as soon as is reasonably practicable after the making of the determination<sup>7</sup>. Furthermore, where it appears to the court that there is a real possibility that such an order will be made in relation to the assertion, it may make an order<sup>8</sup> in relation to the

assertion at any time before it has made a determination with regard to sentencing<sup>9</sup>, in which case the order ceases to have effect when the court makes a determination with regard to sentencing<sup>10</sup>.

An order under these provisions must not be made in relation to an assertion if it appears to the court that the assertion was previously made at the trial at which the person was convicted of the offence or during any other proceedings relating to the offence<sup>11</sup>. Any such order may be revoked at any time by the court<sup>12</sup>.

Where a court makes any such order in relation to any assertion, at any time when the order has effect the assertion must not be published<sup>13</sup> in Great Britain<sup>14</sup> in a written publication<sup>15</sup> available to the public, or be included in a relevant programme<sup>16</sup> for reception in Great Britain<sup>17</sup>.

An order after sentencing<sup>18</sup> may be made whether or not an order has previously been made<sup>19</sup> with regard to the case concerned<sup>20</sup> and, unless it has been revoked by the court, ceases to have effect at the end of the period of 12 months beginning with the day on which it is made<sup>21</sup>.

Nothing in these provisions affects any prohibition or restriction imposed by virtue of any other enactment on a publication or on matter included in a programme<sup>22</sup> or affects the statutory privilege<sup>23</sup> afforded to reports of court proceedings<sup>24</sup>.

An appeal lies to the Court of Appeal against an order made by the Crown Court under the above provisions in a case where the court has convicted a person on a trial on indictment<sup>25</sup>.

1 These provisions apply where the offence mentioned in heads (1) or (2) in the text is committed on or after 1 April 1997: Criminal Procedure and Investigations Act 1996 ss 61(1), (2), 77(4); Criminal Procedure and Investigations Act 1996 (Appointed Day No 3) Order 1997, SI 1997/682, art 2(1)(b).

2 Criminal Procedure and Investigations Act 1996 s 58(1). As to mitigating factors in sentencing see generally SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 624; and as to committal to the Crown Court for sentence see MAGISTRATES vol 29(2) (Reissue) PARA 777 et seq.

3 Ibid s 58(2). As to appeals against sentence see generally SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 44 et seq.

4 Ie an order under ibid s 58(8): see the text and notes 7, 12, 20-21 infra.

5 Ibid s 58(4).

6 For the purposes of ibid s 58(7), (8) the court makes a determination with regard to sentencing (1) when it determines what sentence should be passed (where this provision applies by virtue of s 58(1)(a)); (2) when it determines whether the person should be committed to the Crown Court for sentence (where this provision applies by virtue of s 58(1)(b)); (3) when it determines what the sentence should be (where this provision applies by virtue of s 58(2)(a)); (4) when it determines whether to grant leave to appeal (where this provision applies by virtue of s 58(2)(b)): s 58(9).

7 Ibid s 58(8)(a).

8 Ie under ibid s 58(7): see the text and notes 9-10, 12 infra.

9 Ibid s 58(3), (7)(a).

10 Ibid s 58(7)(c).

11 Ibid s 58(5).

12 Ibid s 58(7)(b), (8)(b).

13 For these purposes, an assertion is published or included in a programme if the material published or included (1) names the person about whom the assertion is made or, without naming him, contains enough to make it likely that members of the public will identify him as the person about whom it is made; and (2) reproduces the actual wording of the matter asserted or contains its substance: ibid s 59(3).

14 For the meaning of 'Great Britain' see PARA 76 note 3 ante.

15 For these purposes, 'written publication' includes a film, a soundtrack and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings: Criminal Procedure and Investigations Act 1996 s 59(2).

16 For these purposes, 'relevant programme' means a programme included in a programme service within the meaning of the Broadcasting Act 1990 (see PARA 76 ante): Criminal Procedure and Investigations Act 1996 s 59(2).

17 Ibid ss 58(6), 59(1).

18 Ie an order under ibid s 58(8): see the text and notes 7, 12 supra.

19 Ie under ibid s 58(7): see the text and notes 9-10, 12 supra.

20 Ibid s 58(8)(d).

21 Ibid s 58(8)(c).

22 Ibid s 61(3). For examples of such restrictions see PARA 126 note 2 ante.

23 The privilege referred to is that conferred by the Law of Libel Amendment Act 1888 s 3 (repealed, except in relation to criminal libel, by the Defamation Act 1996 ss 16, 20(2), Sch 2): see PARA 298 ante. That repeal, however, came into force on 4 September 1996, whereas the Criminal Procedure and Investigations Act 1996 s 61 came into force on 4 July 1996. Quære whether the reference should now be taken to include the privilege conferred by the Defamation Act 1996 s 15(1), Sch 1 para 2: see PARA 132 ante. At the date at which this volume states the law, s 15, Sch 1 had not been brought into force.

24 Criminal Procedure and Investigations Act 1996 s 61(4).

25 See the Criminal Justice Act 1988 s 159(1)(a) (added by the Criminal Procedure and Investigations Act 1996 s 61(6)).

## UPDATE

### 302 Orders in respect of certain assertions

NOTE 23--1996 Act s 15, Sch 1 now in force: SI 1999/817.

Halsbury's Laws of England/LIBEL AND SLANDER (VOLUME 28 (REISSUE))/6. STATUTORY RESTRICTIONS ON REPORTING OF CERTAIN DEROGATORY ASSERTIONS/303-400. Offences in relation to reporting of assertions.

### 303-400. Offences in relation to reporting of assertions.

If an assertion is published<sup>1</sup> or included in a relevant programme<sup>2</sup> in contravention of the statutory restriction<sup>3</sup>, each of the following persons is guilty of an offence:

130 (1) in the case of publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;

131 (2) in the case of publication in any other form, the person publishing the assertion;

132 (3) in the case of an assertion included in a relevant programme, any body corporate engaged in providing the service in which the programme is included and any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>4</sup>.

A person guilty of any such offence is liable on summary conviction to a fine of an amount not exceeding level 5 on the standard scale<sup>5</sup>.

Where a person is charged with such an offence it is a defence to prove that at the time of the alleged offence:

- 133 (a) he was not aware, and neither suspected nor had reason to suspect, that an order restricting publication<sup>6</sup> had effect at that time; or
- 134 (b) he was not aware, and neither suspected nor had reason to suspect, that the publication or programme in question was of, or (as the case may be) included, the assertion in question<sup>7</sup>.

Where any such offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director<sup>8</sup>, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>9</sup>.

The statutory restriction whereby the order of a judge is required in order to commence a prosecution for a libel published in a newspaper<sup>10</sup> does not apply to a prosecution for an offence under these provisions<sup>11</sup>.

1 For the meaning of 'published' for these purposes see PARA 302 note 13 ante (definition applied by the Criminal Procedure and Investigations Act 1996 s 60(6)).

2 For the meaning of 'included in a programme' and 'relevant programme' see PARA 302 notes 13, 16 ante (definitions applied by *ibid* s 60(6)).

3 *Ie* in contravention of *ibid* s 59: see PARA 302 ante.

4 *Ibid* s 60(1).

5 *Ibid* s 60(2). The 'standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37(2) (as substituted): Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(a)). See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 1991 s 18 (substituted by the Criminal Justice Act 1993 s 65); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

6 *Ie* an order under the Criminal Procedure and Investigations Act 1996 s 58(7) or (8): see PARA 302 ante.

7 *Ibid* s 60(3).

8 In relation to a body corporate whose affairs are managed by its members, 'director' means a member of the body corporate: *ibid* s 60(5).

9 *Ibid* s 60(4).

10 *Ie* the Law of Libel Amendment Act 1888 s 8: see PARA 293 ante.

Criminal Procedure and Investigations Act 1996 s 61(5).

## UPDATE

### 303-400 Offences in relation to reporting of assertions

NOTE 5--1991 Act s 18, consolidated in the Powers of Criminal Courts  
(Sentencing) Act 2000 s 128, repealed: Criminal Justice Act 2003 Sch 37  
Pt 7. See now s 162.